Origins and Meaning of Section

# 92A

## The 1982 Constitutional Amendment on Resources

*J. Peter Meekison*
*Roy J. Romanow*
*William D. Moull*

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Legal Deposit First Quarter
Bibliothèque nationale du Québec

**Canadian Cataloguing in Publication Data**
Meekison, J. Peter, 1937-
Origins and meaning of Section 92A

Foreword and summary in English and French.
ISBN 0-88645-013-6

1. Canada. Constitution Act, 1982.
2. Canada—Constitutional law—Amendments.
3. Natural resources—Law and legislation—Canada. I. Romanow, Roy J. II. Moull, William D., 1950- III. Institute for Research on Public Policy IV. Title.

KE4275.M44 1984 346.7104'4 C85-090015-8

The Institute for Research on Public Policy
2149 Mackay Street
Montreal, Quebec H3G 2J2

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# *Foreword*

When the first Constitutional Conference met in 1968, and for several years to follow, the western premiers felt that their provinces had no interest in constitutional change. The constitutional discussions were regarded only as a time-consuming nuisance. That view changed dramatically in the mid-1970s after the first OPEC oil crisis. The federal government brought in policies that held the price of oil below world levels, altered the tax treatment of provincial royalty payments and fundamentally changed the rules of the game for the petroleum industry. It became clear that the West had a very great interest indeed in the Constitution and that all was *not* well with the way it stood. The protection of provincial property rights in resources, the strengthening of provincial jurisdiction in the field, and the clear definition of provincial powers to raise revenues from resources by royalties and by taxes, became major objectives of constitutional reform. From then on, the western provinces were strong and determined players with clear purposes in mind.

The federal-provincial negotiations over resources and resource jurisdiction from 1978 to 1981 were arduous and at times acrimonious. In the end, the western provinces were the only ones to succeed in getting a change in the distribution of legislative powers under the Constitution. A new section 92A was agreed upon at the Conference of November 1981, and became a part of the Constitution of Canada on 17 April 1982. It did not achieve everything that western governments had sought, but it was a major accomplishment. The West also got the amending procedure for the Constitution that it wanted, with the specified right of a province to dissent from any

future amendment that might derogate from its powers or from its proprietary rights. The success of the West in achieving its most important objectives was greater than that of any other province and perhaps greater than that of the federal government.

Now that section 92A is part of the Constitution, what does it mean? What does it change? What can provincial governments do now that they formerly could not do? And, perhaps more important, what can the federal government or Parliament *not* do that they formerly could? These are critical questions for the people and governments of the western provinces—and also for the petroleum industry. This book—the first from the Western Resources Program of the Institute for Research on Public Policy—is an attempt to answer such questions, to the extent that they can be answered without judicial decisions to clarify some doubtful issues.

The authors were chosen by the Institute for the authority they could bring to an exposition of this complex matter. Roy Romanow was attorney general of Saskatchewan and one of the most respected and influential negotiators during all the critical stages. Peter Meekison was the senior advisor to the government of Alberta, the government with the greatest interest in the resource issues. He played a leading role in every discussion that bore in any way on resources and on the interests of the West. No authors could better explain the objectives of the western provinces and the considerations that led to the final result.

William Moull provides an informed and expert analysis of the new constitutional law, of its meaning and implications where those are clear, and of its obscurities and uncertainties where those exist. It is the kind of assessment that will be of great assistance to all in government or industry who are concerned with resources and resource development. While Mr Moull's analysis is of greatest importance in the West, it has implications for resource development in all parts of Canada.

Section 92A has not yet received the attention by lawyers and courts that has come to the Charter of Rights. In a more limited field, this new provision of the Constitution may, however, turn out to be just as significant. This volume will make possible a better understanding of the altered constitutional basis for resource development and administration that now is the law of the land.

Gordon Robertson
Past President and Fellow-in-Residence
December 1984

# *Avant-propos*

En 1968, au moment de la première Conférence constitutionnelle, les premiers ministres de l'Ouest estimaient—et cela devait durer plusieurs années—que la modification de la Constitution n'avait aucun intérêt pour leurs provinces. Pour eux, ces discussions ne sont qu'une perte de temps. Ce point de vue change radicalement au milieu des années 70, après la crise du pétrole déclenchée par l'OPEP. Le gouvernement fédéral adopte alors une politique qui a pour effet de maintenir le prix du pétrole au-dessous de celui du marché mondial, de modifier le traitement fiscal des redevances perçues par les provinces et de changer fondamentalement les règles du jeu pour l'industrie pétrolière. Du même coup, il devient évident que la Constitution intéresse effectivement l'Ouest de très près et qu'elle ne fait pas du tout son affaire telle qu'elle est. La protection des droits de propriété des provinces sur leurs ressources naturelles, l'accroissement de la compétence provinciale dans ce domaine et la définition précise des pouvoirs provinciaux en matière de prélèvement de redevances et de taxes sur les ressources naturelles deviennent d'importants objectifs de la réforme constitutionnelle. Dorénavant, les provinces de l'Ouest allaient être des interlocuteurs sérieux, résolus et mus par des intentions précises.

De 1978 à 1981, les négociations fédéro-provinciales sur les ressources et le partage des pouvoirs afférents s'avèrent difficiles et parfois même acrimonieuses. En fin de compte, les provinces de l'Ouest sont les seules à pouvoir obtenir un changement dans la répartition constitutionnelle des pouvoirs législatifs. Après avoir fait l'objet d'un accord à la Conférence de novembre 1981, un nouvel

article, le 92A, est incorporé à la Constitution canadienne le 17 avril 1982. Ce texte, même s'il ne réalise pas tous les vœux des gouvernements de l'Ouest, n'en constitue pas moins une réussite éclatante pour eux. L'Ouest parvient aussi à faire accepter la procédure de modification constitutionnelle qu'il désire, où se trouve expressément énoncé le droit pour une province de s'opposer à toute modification ultérieure qui porterait atteinte à ses pouvoirs ou à ses droits de propriété. Les provinces de l'Ouest ont ainsi eu plus de succès dans la poursuite de leurs objectifs les plus importants que n'importe quelle autre province et peut-être même que le gouvernement fédéral.

Maintenant que l'article 92A fait partie de la Constitution, on peut se demander: Qu'est-ce que cela signifie? Qu'est-ce que cela change? Quels nouveaux pouvoirs ont désormais les gouvernements provinciaux? Et, ce qui est peut-être plus important encore : qu'est-ce que le gouvernement fédéral ou le Parlement ne peuvent *plus* faire maintenant? Ce sont là des questions essentielles pour les citoyens et les gouvernements des provinces de l'Ouest, ainsi que pour l'industrie pétrolière. Cet ouvrage—le premier produit dans le cadre du Programme de recherche sur les ressources naturelles de l'Ouest de l'Institut de recherches politiques—tente d'apporter des réponses, dans la mesure où cela est possible en l'absence de décisions judiciaires qui clarifieraient certains points douteux.

Les auteurs choisis par l'Institut font autorité sur la question et sont bien placés pour en exposer tous les aspects, souvent complexes. Roy Romanow était en effet procureur général de Saskatchewan, et fut l'un des négociateurs les plus respectés et les plus influents, à toutes les étapes critiques du processus. Quant à Peter Meekison, il était le conseiller principal du gouvernement albertain, gouvernement portant le plus d'intérêt au problème des ressources naturelles, et il joua un rôle éminent dans toutes les discussions touchant de près ou de loin à ce domaine et en général aux intérêts de l'Ouest. Personne mieux que ces auteurs ne pouvait expliquer les objectifs des provinces de l'Ouest et les facteurs qui ont conduit au résultat final.

De son côté, William Moull se livre en expert, à une analyse documentée de la nouvelle Loi constitutionnelle, de son sens et de ses implications là où ils sont clairs, de ses points obscurs et ambigus là où il y en a. Cette étude sera d'une grande utilité à tous ceux qui—au gouvernement, dans l'Administration et dans l'industrie—se préoccupent des ressources naturelles et de leur exploitation dans toutes les régions du Canada, même si elle intéresse au premier chef l'Ouest.

Les avocats et les tribunaux n'ont pas encore accordé à l'article 92A toute l'attention dont a fait l'objet la Charte des droits et libertés. Dans un champ plus restreint, cette nouvelle disposition de la Constitution

pourrait cependant se révéler tout aussi importante. Cet ouvrage, j'en suis sûr, permettra de mieux comprendre le changement constitutionnel qui a été ainsi opéré et les nouveaux principes qui régissent désormais la mise en valeur et l'administration des ressources naturelles.

Gordon Robertson,
ancien président
Décembre 1984

# *The Authors*

**Peter Meekison** and **Roy Romanow** took part directly in the series of constitutional negotiations that began in 1978 and led to the 1982 reforms. At the time (and until recently), Dr Meekison was deputy minister of the department of federal and intergovernmental affairs in the government of Alberta. During the federal-provincial talks, he chaired a subcommittee on natural resources, composed of senior government officials, which reported to the Continuing Committee of Ministers on the Constitution this committee had been (established by the prime minister and the provincial premiers). Mr Romanow was then attorney general in the government of Saskatchewan, and co-chairman of the Continuing Committee. Peter Meekison has now returned to academic life and holds the position of vice-president (Academic) at the University of Alberta, while Roy Romanow is engaged in the private practice of law in Saskatoon.

**William Moull**, a member of the Ontario Bar, is currently associate professor at Osgoode Hall Law School of York University. He conducted this study while he was associated with the firm of Davies, Ward and Beck, Barristers and Solicitors, in Toronto. Mr Moull is the author of two related articles: "Section 92A of the Constitution Act, 1867," and "Natural Resources: The Other Crisis in Canadian Federalism."

# *Summary*

Among Canada's constitutional reforms of 1982, only one—section 92A—represents a change in the division of legislative authority between the federal and the provincial governments. It is an amendment to the part of the Constitution that sets out the powers of provincial legislatures. As such, section 92A grants certain provincial jurisdiction, in particular over non-renewable natural resources, forestry resources and electrical energy.

The first paper here, co-authored by Peter Meekison and Roy Romanow, is written from the vantage point of Alberta and Saskatchewan, the leading provincial advocates of constitutional reform in respect of non-renewable resources. It traces the origins of section 92A back to intergovernmental disputes over resources during the 1970s. The authors argue that several oil and gas policy initiatives taken by the federal government, and two unfavourable decisions by the Supreme Court of Canada, helped to forge a strong determination on the part of the western provinces to secure changes to the Constitution that would "confirm, clarify and strengthen provincial jurisdiction over natural resources." If these changes were not obtained, the provinces feared that resource management and control would be wrested from them.

Meekison and Romanow chronicle the constitutional negotiations between 1978 and 1981 and show how the resources item got onto the agenda and, subsequently, the way that possible reforms came to be expressed in the so-called "best effort" draft amendment of 1979. Although the federal government later withdrew the specific

provisions of this draft, it was to stand as the high watermark in the fulfilment of western provincial objectives, and to serve as the prototype for section 92A. After the 1980 Quebec referendum, negotiations on the resources item became more difficult; the federal government tied possible concessions on that matter to gains that it expected on another item on the agenda—powers over the economy. The situation worsened in October 1980 when the National Energy Program and the resolution to unilaterally patriate and amend the Constitution were introduced within three weeks of each other.

In the end, the provinces that formed the "Gang of Eight" in 1981 (including Alberta and Saskatchewan) concentrated not so much on demands concerning jurisdiction over resources, but more on the amending formula that would be enshrined in the patriated Constitution. They championed, and eventually secured, a formula that would expressly protect existing provincial jurisdiction and proprietary rights in any future constitutional changes. Thus, while the eventual reforms of 1982 included section 92A, in the latter days the federal-provincial bargaining ground had shifted.

Despite being regarded as incidental to the final agreement and something of a windfall, the enactment of the resources amendment is characterized by Peter Meekison and Roy Romanow as "a significant accomplishment." It was won without concessions having been made on increased federal powers over the economy. For that alone, the authors say, "the western provinces came out ahead." While some objectives were not met, these provinces got the amending formula they wanted (and the protection it affords to provincial ownership and control of resources). Moreover, the authors acknowledge that in section 92A not only did the provinces obtain confirmation and clarification of their pre-existing jurisdiction in the field, they gained both the legislative authority to levy indirect taxes on resources and concurrent jurisdiction (shared with Parliament) over interprovincial trade in resources.

The other paper here, by William Moull, is an objective examination of the legal meaning and effect of section 92A. In particular, the author tries to determine whether the amendment really confers any new authority, especially on the petroleum-producing provinces of western Canada.

He makes the point that what is new about section 92A, if nothing else, is that it entrenches in the Constitution a set of provincial legislative powers dealing explicitly with natural resources. The author reviews the kinds of resources it encompasses, observing that forestry resources seem to be the only renewable type within the scope of section 92A, leaving outside its scope water (unless used for hydro-electrical purposes), wildlife and agricultural land. On the whole,

however, precise definitions are found lacking. The exception is the Sixth Schedule, which defines the term "primary production" that appears throughout the amendment and signifies the limits of provincial jurisdiction over non-renewable natural resources and forestry resources. The amount of detail in the Schedule suggests that the definition of primary production may be broader under section 92A than its usual judicial interpretation. Above all, however, the amendment permits laws to be made only in relation to resources "in the province." Consequently, Mr Moull finds that it does not apply to those offshore resources that are not provincially owned.

The kinds of legislative authority provided for in section 92A can be divided between those that enable revenues to be raised from resources and those that enable regulation of various aspects of resource development. Compared to previous constitutional law, a new power for the provinces is identified in each category. Subsection 92A (4) allows for the use of indirect taxes on resources; previously, only direct taxes could be levied. Subsection 92A (2) confers on the provinces, for the first time, the power to make laws about the export of resource production beyond their borders (to destinations within Canada). The new jurisdiction is shared with Parliament in such a way that, if a conflict arises, federal legislation would override provincial legislation. Both these new powers carry prohibitions against differential or discriminatory treatment between the province in which the resources and laws originate, and other parts of the country.

None of the provisions of section 92A depend for their validity on provincial Crown ownership of the resources. Also, in general, because of subsection 92A (6), the amendment can be interpreted only to add to pre-existing provincial powers, not to detract from them.

Yet despite these few points of certainty, much of the legal effect of section 92A remains open to interpretation and argument; Mr Moull raises the various possibilities in detail. Overall, he concludes that "the principal effect of section 92A is to bring provincial legislative powers over resources more closely in line with the powers that flow from provincial Crown proprietary rights."

# *Abrégé*

Dans l'ensemble de la réforme constitutionnelle canadienne de 1982, seul l'article 92A opère un changement dans le partage des pouvoirs législatifs entre le gouvernement fédéral et les gouvernements provinciaux. Il s'agit d'une modification de l'article 92 de la Loi constitutionnelle de 1867, où sont énoncés les pouvoirs exclusifs des corps législatifs provinciaux. L'article 92A élargit à ce titre la compétence provinciale, en particulier sur les ressources naturelles non renouvelables, les ressources forestières et l'énergie électrique.

Le premier texte de ce volume, dû à Peter Meekison et Roy Romanow, est écrit du point de vue privilégié de l'Alberta et de la Saskatchewan, les deux provinces qui étaient le plus en faveur d'une réforme constitutionnelle à l'égard des ressources naturelles non renouvelables. Les deux auteurs font remonter les origines de l'article 92A au contentieux intergouvernemental sur la question qui a marqué les années 70. Ils soutiennent que plusieurs initiatives politiques du gouvernement fédéral en matière de pétrole et de gaz et deux décisions défavorables de la Cour suprême du Canada ont contribué à susciter chez le provinces de l'Ouest la volonté d'obtenir des modifications à la Constitution qui puissent «confirmer, clarifier et enforcer la compétence provinciale en ce qui a trait aux ressources naturelles». Les provinces craignaient, si elles n'obtenaient pas ces changements, de voir la gestion et le contrôle des ressources naturelles leur échapper.

Dans le récit chronologique qu'ils font des négociations constitutionnelles menées de 1978 à 1981, Meekison et Romanow montrent comment la question des ressources naturelles fut portée à l'ordre du

jour et comment, par la suite, les réformes possibles trouvèrent leur expression dans le projet de modification de 1979, dit «de la meilleure volonté». Malgré le retrait ultérieur, par le gouvernement fédéral, des dispositions particulières de ce projet, celui-ci n'en devait pas moins rester le poste le plus avancé des provinces de l'Ouest dans la poursuite de leurs objectifs et servir de prototype à l'article 92A. Après le référendum québécois de 1980, les négociations sur la question des ressources naturelles devinrent plus difficiles; le gouvernement fédéral subordonna alors ses concessions éventuelles en la matière à l'obtention des avantages qu'il escomptait touchant une autre question à l'ordre du jour : les pouvoirs économiques. La situation empira en octobre 1980 par suite du lancement du Programme national de l'énergie, puis, trois semaines plus tard, de la décision de rapatrier et modifier unilatéralement la Constitution.

Finalement, les provinces qui formaient la «Bande des huit» en 1981 (notamment l'Alberta et la Saskatchewan) concentrèrent leurs efforts moins sur la revendication d'une compétence élargie en matière de ressources naturelles que sur la formule d'amendement qui ferait partie intégrante de la Constitution rapatriée. Ces provinces préconisaient—et obtinrent en fin de compte—une formule qui garantirait expressément les pouvoirs et droits de propriété acquis des provinces en cas de modification ultérieure de la Constitution. On voit donc que, même si l'article 92A a fini par trouver place dans les modifications de 1982, les négociations fédéro-provinciales avaient dans les derniers temps changé de terrain.

Bien qu'elle soit considérée comme une conséquence de l'accord final et en quelque sorte comme un avantage inattendu, l'adoption de l'amendement relatif aux ressources naturelles n'en constitute pas moins, selon Meekison et Romanow, «un succès appréciable». Les provinces ont en effet acquis cette modification sans faire de concessions au gouvernement fédéral en ce qui a trait à l'accroissement des pouvoirs de celui-ci sur l'économie. Ne serait-ce que pour cette raison, déclarent les auteurs, «les provinces de l'Ouest s'en sont bien tirées». Bien qu'elles n'aient pas atteint tous leurs objectifs, elles ont bel et bien obtenu la formule d'amendement qu'elles voulaient et par le fait même la protection que celle-ci assure aux droits provinciaux de propriété et de libre disposition des ressources naturelles. Les auteurs reconnaissent en outre qu'avec l'article 92A les provinces non seulement ont reçu confirmation et clarification de la compétence qui leur était antérieurement acquise dans le domaine en cause, mais encore elles se sont vu accorder aussi bien le pouvoir législatif de prélever des impôts indirects sur les ressources naturelles que le partage de compétence (avec le Parlement) en matière de commerce interprovincial dans ce domaine précis.

Le second texte de William Moull, est un examen objectif de la signification et de l'effet juridiques de l'article 92A. L'auteur essaie notamment d'y établir si cette modification confère effectivement de nouveaux pouvoirs, en particulier aux provinces productrices de pétrole de l'Ouest canadien.

Il montre que la nouveauté de l'article 92A réside dans le fait—ne serait-ce que celui-là—qu'il inscrit dans la Constitution un ensemble de pouvoirs législatifs provinciaux liés explicitement aux ressources naturelles. L'auteur passe en revue les catégories de ressources énumérées dans cet article et constate que les ressources forestières semblent être les seules du type renouvelable à entrer dans son champ d'application : s'en trouveraient ainsi exclues l'eau (sauf aux fins d'hydro-électricité), la faune et les terres agricoles. Dans l'ensemble, cependant, on constate l'absence de définitions précises. La sixième Annexe fait exception, dans la mesure où elle définit l'expression «production primaire», régulièrement employée tout au long de l'article, et trace les limites de la compétence provinciale en matière de ressources naturelles non renouvelables et forestières. La définition détaillée qu'en donne l'Annexe semble toutefois indiquer que la production primaire pourrait avoir un sens plus large aux termes de l'article 92A que selon l'interprétation judiciaire habituelle. Mais le plus important est que cet article ne permet de légiférer que sur les ressources «de la province». M. Moull en conclut qu'il ne s'applique pas aux ressources marines dont les provinces ne sont pas propriétaires.

On peut classer les pouvoirs prévus à l'article 92A en deux catégories : ceux qui permettent de tirer des recettes des ressources et ceux qui permettent de réglementer les divers aspects de leur exploitation. En comparant les nouvelles dispositions à la loi constitutionnelle antérieure, l'auteur constate qu'elles accordent aux provinces un nouveau pouvoir dans chaque catégorie. Ainsi, le paragraphe 4 de l'article 92A permet le prélèvement d'impôts indirects sur les ressources naturelles, alors qu'auparavant seuls les impôts directs étaient autorisés; de même, le paragraphe 2 confère pour la première fois aux provinces le pouvoir de légiférer en ce qui concerne l'exportation, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles. Cependant, comme les provinces partagent cette compétence avec le Parlement, il s'ensuit qu'en cas de conflit la législation fédérale annule la provinciale. En outre, les nouveaux pouvoirs sont tous deux limités par des dispositions interdisant tout traitement préférentiel ou discriminatoire de la part de la province qui légifère sur ses propres ressources à l'égard des autres parties du pays.

Les dispositions de l'article 92A s'appliquent même si les droits de propriété provinciaux sur les ressources en cause ne sont pas détenus par la Couronne. D'ailleurs, d'un point de vue général, on ne peut, en raison du paragraphe 6, qu'interpréter l'article modificatif dans le sens d'un accroissement, et non d'une diminution, des pouvoirs provinciaux antérieurs.

Pourtant, ces quelques certitudes mises à part, une grande partie de l'effet juridique de l'article 92A reste sujette à interprétation et à discussion. M. Moull expose en détail les diverses possibilités sous ce rapport. Sa conclusion d'ensemble est que «l'article 92A a pour effet principal de faire coïncider plus étroitement les pouvoirs législatifs des provinces sur les ressources naturelles avec les pouvoirs qui découlent des droits de propriété de l'État provincial [de la province]».

# *Text of Section 92A and The Sixth Schedule, Constitution Act, 1982*

***Non-Renewable Natural Resources, Forestry Resources and Electrical Energy***

**92A.** (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

## *The Sixth Schedule*
## *Primary Production from Non-Renewable Natural Resources and Forestry Resources*

1. For the purposes of section 92A of this Act,

> (a) production from a non-renewable natural resource is primary production therefrom if
>
> (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
>
> (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent or crude oil; and
>
> (b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

# *1: Western Advocacy and Section 92A of the Constitution*

*J. Peter Meekison and Roy J. Romanow*

## *Introduction*

Section 92A is the only constitutional amendment contained in *The Constitution Act, 1982*, which, on the face of it, alters the division of powers between the Canadian government and the ten provincial governments. For the first time since Confederation, a constitutional amendment transferred legislative authority from Parliament to the provinces. The primary impetus for the amendment was provincial reaction to a number of new federal policy initiatives, beginning in the early 1970s, and two major decisions of the Supreme Court of Canada later in the decade; the four western provinces, in particular, claimed that these factors restricted and impinged upon provincial rights and responsibilities with respect to natural resources. By the mid-1970s, the western provinces were pressing for constitutional reform to confirm, clarify and strengthen provincial jurisdiction over natural resources.

In the early 1970s, an imminent international energy shortage and a rapid rise in the price of oil made energy a crucial issue of public policy. National attention focussed more and more on the development and production of natural resources and the security of national energy supplies. Moreover, as a result of the higher cost of international oil, the pricing and taxation of natural resources became increasingly a cause of conflict between the federal and provincial governments.

Throughout the decade, the petroleum-producing provinces of Alberta, British Columbia and Saskatchewan undertook a series of policy initiatives designed to clarify, strengthen and exercise more effectively their ownership rights over the natural resources within their boundaries. All three provincial governments increased their

royalty rates to gain a greater part of the economic rent from spiralling oil prices, introduced new marketing legislation and regulations, and adopted measures that would give them more control over the way the oil industry was run in their respective provinces.

In an effort to assert the Crown's position as owner of the natural resources within Alberta and the rights to the revenues derived from those resources, the provincial government, in the fall of 1973 introduced legislation which provided that, even after production, the royalty share of Crown oil would remain its property. Before this, ownership of almost all the oil was, in effect, transferred at the wellhead from the provincial government to the resource company. The new legislation increased the Alberta government's control of Crown-owned resources through the establishment of the Alberta Petroleum Marketing Commission. On top of its role as the regulator of production and conservation, the provincial government was now in a position to market its own oil. The legislation was amended in the fall of 1975 to include natural gas and all oil production from Crown lands.

The Saskatchewan government, too, attempted to assert greater control over its oil and gas resources. Bill 42, *An Act Respecting the Conservation, Stabilization and Development of Oil and Gas in Saskatchewan*, was introduced in the Saskatchewan Legislature in December 1973. Excerpts from the debate on this bill give some flavour of the strong feelings that the resource issue provoked:

> The future windfalls should come to the people of Saskatchewan. The people have a right to demand that for public benefits....We are willing to negotiate on such matters as the price of our crude oil sold in Canada but concessions on our part should bring reciprocal benefits in the form of redress, of freight rate inequities, stability for our agricultural economy, more rapid industrialization of the prairie region of Canada.[1]

In 1973, recognizing the rapidly changing conditions in the energy field, the federal government embarked on a series of new policy initiatives that directly affected the western provinces. Some of the more important of these were:

(i) In the fall of 1973, Ottawa announced controls on crude oil exports and established an oil export tax. These controls were criticized vehemently by the Alberta and Saskatchewan governments; both saw the export charge as an intrusion into provincial resource ownership rights.

(ii) In December 1973, the federal government established a national market for oil, with a uniform price across Canada.[2]

This erased the "Ottawa Valley Line" and enabled western crude oil to be marketed in eastern Canada. Until then, the Canadian market has been divided, with imported oil being sold in Quebec and Atlantic Canada, and western crude in Ontario, the dividing line being the Ottawa Valley.

(iii) At the First Ministers' Conference on Energy on 22-23 January 1974, the federal government made it clear that the domestic price of oil should no longer be tied to or determined by the international price; in fact, they insisted that it should be lower than the international price. Expensive oil imports were to be subsidized by proceeds from the oil export tax. These principles were confirmed in the first federal-provincial energy-pricing agreement, which was established in March 1974.[3]

(iv) *The Petroleum Administration Act* was initially introduced in the spring of 1974 after the energy agreement had been reached. When the new Parliament convened in the fall, the legislation was reintroduced. However, its scope had been expanded to include natural gas. In its effect on federal-provincial relations, it was perhaps the most significant piece of federal energy legislation before the 1980 National Energy Program. The most controversial sections of the Act, as far as the producing provinces were concerned, were its pricing provisions. The Act provides for two means of setting prices for oil and natural gas entering into interprovincial trade: unilaterally by the federal government, or through negotiation between the provincial governments and Ottawa. Between 1974 and 1980, the price had been set through negotiation and then confirmed in federal-provincial agreements. In 1980, when the National Energy Program was introduced, the federal government invoked those parts of the 1975 *Petroleum Administration Act* that enabled it unilaterally to establish prices for oil and natural gas.

(v) The federal government sought to make major changes to resource taxation. In the November 1974 budget, Ottawa declared that royalty payments made to the provinces by the oil and gas industry were to be non-deductible in the determination of federal corporate income tax. Before this, royalties paid to the Crown had never been considered as "income." The federal government argued that it had to protect its corporate income tax revenues, which, it claimed, were being eroded by the large increases in royalty rates imposed by the provinces. But the governments of Alberta and Saskatchewan maintained that the move would seriously jeopardize the petroleum industry and was seen as a direct challenge to provincial

> resource ownership and jurisdiction. They further contended that the new policy was tantamount to taxing Crown property and was in contravention of section 125 of *The Constitution Act, 1867*, which reads: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation." After negotiations with the provinces, the federal government modified its position on deductibility in its June 1975 budget. The changes in effect restored deductability to pre-energy crisis royalty levels — a compromise on the part of the federal government.

Westerners were becoming aggrieved at Ottawa's handling of the natural resources question. They knew that the domestic price of oil was lower than the world price, and the resultant benefits, mainly for consumers in eastern Canada, were being underwritten by the oil-producing provinces — the owners of the resources.

Provincial ownership of resources had been agreed to by the Fathers of Confederation as one means by which provincial governments could generate revenues. Section 109 of *The Constitution Act, 1867*, reads as follows:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Manitoba had become a province in 1870, Alberta and Saskatchewan in 1905; unlike the other provinces, they did not receive proprietary rights to their lands and resources. In 1930, after a long and sometimes bitter debate, the ownership of the resources was transferred to the three prairie provinces under the *Natural Resources Transfer Agreement* — confirmed by the *Constitution Act, 1930* — so that they "should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of natural resources." Thus, provinces now view the question of natural resources from the dual perspective of owner and legislator.

The energy issue became another cause of disputation between eastern and western Canada in the 1970s; the petroleum-producing provinces in the West were subsidizing consumers in the East, most of whom lived in Quebec and Ontario. In the 1940s, when central Canadian hydro power was one-fifth the price of its prairie counter-

part, Ottawa had made no attempt to shelter the prairies from high electricity rates. No efforts had been made then to sell iron ore, gold, copper, asbestos or a variety of other resources at less than the world price.

Viewed individually, these various federal energy policies may not be considered particularly detrimental to the provincial interest. Cumulatively, however, they were regarded with increasing concern in the West and were a factor in the establishment of the Western Premiers' Task Force on Constitutional Trends (this was set up at the 1976 Western Premiers' Conference in Medicine Hat). In its 1979 report, its third, the Task Force stated:

> ...some of the most contentious issues in federal-provincial relations in recent years have been centred around [sic] the natural resource sector. Various federal initiatives, especially since 1973, have resulted in increased tensions between the federal government and the provinces, and in some cases have severely restricted the freedom of provincial governments to exercise their responsibilities over the management of renewable and nonrenewable resources.[4]

In the aggregate, these policies were considered by the oil- and gas producing provinces of western Canada to be an attempt to wrest resource management and control from the provincial governments. Western concerns were reinforced when the minister of finance, John Turner, stated in his 6 May 1974 budget that "a provincial resource is also a national resource, and the federal government has a responsibility to see that a reasonable portion of this gain is shared by all Canadians."[5]

## *The Court Battles*

During the early 1970s, too, a number of jurisdictional cases were brought before the Supreme Court of Canada. The court decisions on the Central Canada Potash case and the Canadian Industrial Gas and Oil Ltd. case are crucial to an understanding of the constitutional negotiations on resources. To a very considerable degree, the judgments in these two cases, concerning resource taxation and the interprovincial and international trade of natural resources, coloured all future constitutional negotiations on resources.

## *(1) Central Canada Potash Case*[6]

The Central Canada Potash case was argued before the Saskatchewan Court of Queen's Bench in 1974, but was not finally resolved until the decision of the Supreme Court of Canada four years later. At issue was whether the government of Saskatchewan's legislation establishing a potash pro-rationing scheme was within provincial jurisdiction under the *Constitution Act*.

The pro-rationing scheme had been introduced in 1969 by Liberal Premier Ross Thatcher in response to sliding world prices and overproduction in the potash industry. That year, prices had fallen so low that producers could not recover their manufacturing costs. In order to save the Saskatchewan potash industry from collapse, regulations were passed to restrict the production of potash by means of a quota system, and to fix a minimum price at the mine gate for potash produced in the province. Almost all potash producers in Saskatchewan, and the federal government, agreed to the pro-rationing scheme.

But five years later the federal government joined Central Canada Potash in its court action, charging that the pro-rationing scheme was an infringement of federal trade and commerce power. The federal government was not acting as an intervener, in order to argue the constitutional points of law, but as a co-plaintiff who could submit evidence and call witnesses. This was an exceptional procedure: even if Central Canada Potash decided to withdraw from the court action, the federal government, as co-plaintiff — could continue prosecution. In effect, the case pitted Parliament's legislative authority on matters of trade and commerce against provincial ownership rights and legislative authority over resources.

In the Saskatchewan Court of Appeal, Chief Justice Culliton acknowledged that the pro-rationing regulations did have some effect on international trade. But the Court noted that because of increasing interprovincial and international trade, it was "virtually impossible" for a provincial legislature to exercise its jurisidiction over resources without affecting federal jurisdiction. The legislation was ruled to be constitutional.

The Supreme Court of Canada reversed the decision, holding that the pro-rationing scheme was not primarily concerned with the conservation of a natural resource — a matter of provincial legislative authority — but was a marketing scheme designed to fix prices. The Court determined that the scheme was an infringement of the exclusive federal trade and commerce power over interprovincial and international trade and, as such, was unconstitutional.

After examining the decision, Saskatchewan argued that the Court had not taken into consideration the essential nature of the prorationing legislation — to prevent the collapse of the potash industry, to conserve the potash resource, and to receive a "fair and reasonable" price for that resource.

### *(2) Canadian Industrial Gas and Oil Ltd. Case*[7]

The Canadian Industrial Gas and Oil Ltd. (CIGOL) case was argued in 1974; the Supreme Court of Canada's judgment was rendered three years later. At issue were the royalty and taxation elements of Saskatchewan's Bill 42, referred to earlier as an attempt to capture greater economic rent from the province's natural resources. The company charged that these aspects of Bill 42 conflicted with the federal government's powers over indirect taxation and international trade and commerce. The CIGOL case is more significant than the Central Canada Potash case: in the former, the right of a province to raise revenues from its own natural resources was under attack.

The nub of the case was whether the Mineral Income Tax established in Bill 42 was a direct or an indirect tax. Under section 92(2) of *The Constitution Act*, the provinces are limited to direct taxation only. The Supreme Court of Canada ruled that the Saskatchewan tax was indirect and, therefore, unconstitutional; only Parliament can legislate indirect taxes. Moreover, the Court ruled that Bill 42 interfered with — indeed contrived to regulate — interprovincial and international trade, matters of exclusive federal jurisdiction; Ottawa alone set the price of Saskatchewan's oil on the world market.

In his dissenting opinion, Justice Dickson stated: "The tax does not set the price. Price sets the tax" and "purchasers would be paying the same price whether the tax existed or not."[8] In fact, it had been intended that the tax would be direct. Provincial taxation did not cause an increase in the international price of oil; the Organization of Petroleum Exporting Countries accomplished that.

With respect to the federal trade and commerce power, the majority decision was based on the premise that federal jurisdiction covered provincial pipeline-gathering systems to the wellhead. Thus, the federal trade and commerce power "backed into" provincial resource management, thereby further limiting provincial jurisdiction over resources.

Within twelve months, the Supreme Court of Canada had twice declared provincial legislation concerning natural resources as *ultra vires* in the province of Saskatchewan. While all provincial governments were concerned about the implications of the judgments, Saskatchewan saw the decisions as a restriction of a province's

proprietary rights and responsibilities in relation to the natural resources within its boundaries. During the ensuing constitutional negotiations on natural resources, there was a great deal of discussion about possible amendments, to avoid or prevent similar decisions in the future.

## *Constitutional Negotiations on Natural Resources*

### *(1) Getting on the Agenda*

Federal-provincial negotiations on constitutional reform took place throughout the late 1960s and early 1970s. But the discussions leading up to the 1971 Victoria Conference did not include an item on natural resources. At that time, energy policy had not yet become a major public concern. By 1975, however, at the annual Premiers' Conference in St John's, Newfoundland, provincial premiers were of the view that discussions on the Constitution should take place within the context of a general review of the distribution of powers, and should include, in particular, the question of the control of natural resources. At the 1976 Premiers' Conference, held in Edmonton, the subject of natural resources was on the agenda of matters to be discussed with the federal government in the next round of constitutional negotiations. By that time, energy policy had become contentious, and the various jurisdictional court cases on natural resources were underway. The subject was ripe for constitutional review.

With the election of the Parti Québécois on 15 November 1976, the pressure for constitutional change increased considerably. In June 1978, the federal government published a paper on constitutional reform, *A Time for Action*, and tabled a draft constitutional amendment bill, Bill C-60, in Parliament.

Bill C-60 proposed amendments to the Constitution that the federal government believed Parliament could enact unilaterally; these included reform of the Senate and certain other aspects of parliamentary government. A proposed Charter of Rights and Freedoms was to apply only to Parliament, with provinces opting in if they chose to do so. According to this proposal, when a province opted in to the Charter of Rights, the federal government's powers of reservation and disallowance would no longer apply to that province. Those sections of the Constitution containing the division of powers between the federal and provincial governments were reproduced without change.

Unlike the sections on the division of powers, one glaring omission from Bill C-60 was any reference to or continuation of section 109 of the *British North America Act* (now the *Constitution Act*) — the

section conferring resource ownership on the original provinces. A First Ministers' Conference was scheduled for 30 October 1978 to discuss constitutional change, including Bill C-60.

Before this conference, at the August 1978 Premiers' meeting held in Regina, the ten premiers discussed both the forthcoming Conference and Bill C-60. They agreed that the key issue in constitutional reform was the division of powers, and that any discussions or proposals for constitutional renewal should be considered within that context. The premiers linked constitutional renewal to the division of powers and identified a number of subjects for federal-provincial discussion, including: resource taxation; the federal declaratory power; the confirmation and strengthening of provincial powers over natural resources; the federal emergency power under its authority to legislate for "peace, order and good government"; and indirect taxation. In addition, "all Premiers expressed grave concern that section 109 of the BNA Act, concerning provincial ownership of natural resources, [had] not been carried forward into the proposed new constitution."[9]

## *(2) First Ministers' Conference, 1978*

During his opening remarks to the First Ministers' Constitutional Conference, Premier Peter Lougheed of Alberta said:

> At the Annual Premiers' Conferences in Toronto in 1974; in Edmonton in 1976; in St Andrew's in 1977; and again in Regina in 1978, all Premiers expressed concern about federal activities which have threatened provincial primacy over the ownership and management of natural resources. Given the importance of natural resources to provincial economies, it is not surprising that this has been a vital issue in many provinces for many years. The only way that there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces.[10]

Premier Allan Blakeney of Saskatchewan observed in his opening address:

> Just over a year ago I stated our position with some force in a brief to the Task Force on Canadian Unity. "Confederation was a

> bargain," I said, "which had some advantages for us. But lately the advantages have become harder and harder to detect, as one after another the well-understood agreements are abandoned or attacked." Speaking for all westerners, I wondered why the public revenues from oil should be shared on a national basis, for the benefit of all Canadians, but not the revenues from other commodities. I asked why exports of western oil should attract a federal levy, the proceeds of which are shared by other Canadians, while exports of hydro-electricity from Ontario and Quebec enrich those provinces alone....Financing our federation is something that must be done by all sides in a fair manner, not by singling out for special federal levies the particular resources of a specific region.[11]

The other two western premiers, William Bennett of British Columbia and Sterling Lyon of Manitoba, did not raise the question of natural resources during their opening remarks.

To expedite matters, Prime Minister Pierre Trudeau proposed to the premiers an "Agenda for Change." The idea was to develop a short list that could be given intensive scrutiny over the next three months. A list of fourteen topics was drawn up and formed the basis of the negotiations in the weeks ahead.[12] (It should be recalled that the federal government was well into its fifth year in office and wanted to speed things along before the general election.) Natural resource jurisdiction was one of the subjects on the agenda. Prime Minister Trudeau said of this:

> I propose that we agree in principle *to clarify the respective powers* of federal and provincial authorities in respect of:
>
> — the control, management and taxation of *natural resources*,
> — the control and regulation of *interprovincial and international trade*.
>
> The object, of course, being to ensure that both orders of government can acquit themselves of their responsibilities effectively, and that a fair share of the benefits from natural resources accrue to the people of the province where they are found, without depriving other Canadians of a reasonable share of these benefits. This is an aspect of the distribution of powers on which you, Premier Blakeney, and you, Premier Lougheed, hold strong views.[13] (emphasis added)

The prime minister also proposed that, together with natural resources, the premiers should look at indirect taxation and Parliament's declaratory power. The mandate was thus sufficiently broad to permit a full discussion on the thorny subject of natural resources.

### *(3) The Positions of Alberta and Saskatchewan*

The premiers delegated detailed examination and discussion of the specific subjects to the Continuing Committee of Ministers on the Constitution (CCMC), a working group of federal and provincial ministers of justice and of intergovernmental affairs that had been established by the First Ministers at the October 1978 conference. This committee was charged with preparing reports and, where possible, drafting constitutional amendments for consideration by the First Ministers at a second Constitutional Conference, set for February 1979. The CCMC met three times between November and January.

It should be realized that various provincial governments attached different priorities to the fourteen individual subjects. For example, British Columbia set great store by Senate reform, while Manitoba was particularly concerned with the proposed Charter of Rights and Freedoms. This is not to suggest that these two governments did not support Alberta and Saskatchewan on the natural resources question; they did, but they were prepared to let these provinces take the initiative in the intergovernmental discussions.

The preliminary Alberta position on natural resources was outlined in a document tabled at the first meeting of the Continuing Committee of Ministers. Alberta presented a series of principles which, if agreed to, could be incorporated into a constitutional amendment:

> The following principles should apply with respect to provincial ownership, control and management of natural resources. The province should be able to:
> (a) decide whether to develop them
> (b) decide by whom, when and why they are going to be developed
> (c) determine the degree of processing that is to take place within the province
> (d) dispose of them upon the conditions that they only be used in a certain way, or in a certain place, or by certain people
> (e) determine the price at which they or the products resulting from their processing will be sold.[14]

Any constitutional amendment was not intended to be limited to crude oil and natural gas, but would apply to all natural resources owned by the Crown.

Alberta's initial position had been spelled out first in November 1974 by the province's attorney general (and, later, energy minister) Merv Leitch, in an address to the Canadian Council of Resource and Environment Ministers. He had examined the constitutional law cases up to that time and had determined that provinces could

exercise their jurisdiction in the five ways mentioned above with respect to the natural resources they owned. The two court cases referred to earlier had undermined existing provincial jurisdiction over resources, or at least the jurisdiction that provinces previously had thought they could exercise. Furthermore, Alberta insisted that limitations be placed on both the federal trade and commerce power and the declaratory power in relation to natural resources.

Saskatchewan proposed a new section 92A of the Constitution. It would:

- give provincial legislatures exclusive jurisdiction over the exploration, exploitation, conservation and management of resources, including rates of production
- give provincial legislatures jurisdiction over trade in resources (interprovincial and international), including terms of export and sale (except as in (c) below)
- provide that the federal trade and commerce power does not apply to trade in production from resources, except if the export and sale are counter to national interests, and that there are compelling circumstances.[15]

In order to win the jurisdictional right to levy indirect taxes, the government of Saskatchewan recommended the following amendment as section 92B:

> Notwithstanding any other provision of the *British North America Acts*, in each Province the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of lands, mines, minerals and forests in the Province and the primary production therefrom.

The Saskatchewan submission on the taxation of resources was designed to redress the CIGOL decision; it proposed that provincial jurisdiction should be expanded to subsume the indirect taxation of natural resources and the primary production of those resources. Given the importance Alberta and Saskatchewan attached to this subject, other provinces were willing to let them lead the discussions.

### *(4) The Key Issues in the Debate*

After the initial provincial positions had been established, the next task was to further define some of the issues that the CCMC would

have to consider in order to develop new constitutional provisions to do with resources. Five major issues dominated the discussions:

(i) the definition of natural resources
(ii) the definition of primary production
(iii) federal jurisdiction over trade and commerce in relation to natural resources
(iv) provincial access to indirect taxation in relation to natural resources
(v) the use of the federal government's declaratory power regarding natural resources.

The definition of natural resources prompted a number of questions. Should it consist of both renewable and non-renewable resources? British Columbia wanted "natural resources" to include both kinds and specifically wished to have water included as a natural resource. But the federal government was unwilling to consider an amendment that encompassed renewable resources such as water, wildlife, fish and forests. It argued that if renewable resources were included in the definition of natural resources, there could be unforeseen constitutional consequences for jurisdiction over agriculture.

A compromise was finally reached at the third meeting of the CCMC in January 1979. It was agreed that the proposed amendment on natural resources would deal with non-renewable resources, as well as forestry resources and the generation and production of electrical energy, including hydro-electric power. This satisfied most governments, but British Columbia continued to seek a broader definition. Forestry resources were already expressly recognized in section 92(5) of *The Constitution Act*, which grants provinces the exclusive authority to make laws in relation to "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon." Electrical energy is produced from a variety of sources — the principal ones being water — a renewable resource — for hydro-electricity; fossil fuels, such as coal, natural gas or oil, for thermal power; and uranium for nuclear power. Rather than attempt to establish differences determined by the resource from which the electricity is generated, the CCMC decided to focus on another related aspect. A separate clause was suggested: "sites and facilities in the province for the generation and production of electrical energy."

Another matter given considerable attention was the concept of primary production. The problem was where to draw the line between primary production — to which the new jurisdiction would apply — and manufacturing, that is between crude oil and "third-

generation" petrochemicals. In the case of forestry, primary production could be construed as having taken place when a tree is cut down or, alternatively, after the log has been processed into lumber or pulp. In the case of natural gas, primary production could be considered to have taken place at the wellhead or, alternatively, after the gas has been processed, and impurities, such as sulphur, had been removed. In the case of oil sands, primary production could be viewed as the mining operation itself, as distinct from further refining.

Although the talks concentrated on the primary production of crude oil and natural gas, it was recognized that the provisions being developed would apply to all non-renewable resources, including forestry and electrical energy. It was understood that primary production meant more than the extraction or the harvesting of natural resources in their natural state.

The discussion on the primary production of natural resources led to the development of a series of definitions now found in the Sixth Schedule to *The Constitution Act*. Although the precision of these definitions may be considered pedantic and fussy, the petroleum-producing provinces were concerned that, otherwise, the courts might interpret the terms too narrowly, while the federal government and Ontario were concerned that the courts might interpret them too broadly. Once the definitions had been agreed to, it was thought that this section should be appended as a schedule and not incorporated in the main body of the Constitution; such precision is rarely found in the body of a nation's constitution, and none are so specific as to make reference to sawdust!

The third question to be resolved was the extent to which federal jurisdiction over trade and commerce should be limited by an amendment expanding provincial jurisdiction over resources. Here the decision in the Central Canada Potash case should be recalled. The Supreme Court of Canada had ruled that the Saskatchewan legislation had interfered with the federal government's trade and commerce power and was therefore unconstitutional. Although the legislation was not in conflict with existing federal legislation, since federal jurisdiction over interprovincial and international trade was exclusive, any provincial legislation adjudged to be at cross purposes with Ottawa's jurisdiction was automatically *ultra vires*.

In the course of the negotiations, the federal government proposed "concurrency with federal paramountcy" in relation to interprovincial trade of non-renewable resources; that is, both orders of government would have legislative responsibilities on the matter, but in the event of a conflict, the federal legislation would take precedence. The federal proposal was limited to interprovincial trade and did not include international trade.

Neither Saskatchewan nor Alberta accepted this proposal; in their view, it did not go far enough. With *The Petroleum Administration Act* in place, the federal government had already declared its intention to occupy the field of interprovincial pricing of oil and natural gas. It left the provinces little room to exercise their proposed new authority. Although both provincial governments acknowledged that the federal government should have the ultimate say in the interprovincial and international trade of natural resources, they argued that certain conditions should be satisfied before federal legislation prevailed over provincial legislation. Concurrency with simple federal paramountcy made provincial legislative authority vulnerable to any federal legislation, such as *The Petroleum Administration Act*. In their opinion, a more stringent "test" beyond simple paramountcy was necessary before federal legislation should be invoked to override provincial legislation. Saskatchewan proposed that federal paramountcy should be used only in the event of a "compelling national interest." Alberta suggested a "national emergency" test.

The Alberta government believed that the "compelling national interest" test for federal paramountcy might prove to be too vague and would not provide adequate safeguards regarding the proposed provincial jurisdiction over interprovincial trade. Saskatchewan was more concerned with international than with interprovincial trade, since most of its resources, particularly potash and heavy oil, were destined for export markets. It should be recalled that in the Central Canada Potash case, the Supreme Court of Canada noted that the resource was exported from Canada, and this was one of the reasons for determining the provincial statute *ultra vires*.

While the federal government was prepared to examine various safeguards for provincial governments with respect to the export of resources to other provinces, it was not prepared to do likewise on the question of international trade. Ottawa argued that any provincial role in international trade would create confusion for Canada's trading partners. In the international sphere there could be only one voice! The provincial governments responded by suggesting that federal paramountcy in international trade should overcome any uncertainty. Both the "test" for the exercise of federal paramountcy and the issue of international trade were not resolved at the ministerial level and were referred to the February 1979 First Ministers' Conference for further discussion and, it was hoped, agreement.

The fourth question to be examined was provincial jurisdiction over the indirect taxation of resources.[16] Bearing in mind the CIGOL decision and the strong case put forth by Saskatchewan that the distinction between direct and indirect taxation was outmoded, the

Continuing Committee of Ministers on the Constitution recommended that the provinces be given legislative authority to levy indirect taxes on non-renewable natural resources. The main problem was to ensure that the exercise of this jurisdiction would be non-discriminatory, i.e., any taxes levied would be paid both within and outside the province. However, the subject was quickly resolved and provisions to ensure non-discrimination were included in the draft text.

The fifth issue was Parliament's declaratory power, found in section 92(10)(c) of the Constitution, which can be invoked to take jurisdiction over "Such Works as, although wholly situate within the Province are before or after their Execution declared...to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

Although the declaratory power was one of the fourteen main subjects discussed by the CCMC, it was also discussed under the rubric of natural resources. Provincial governments argued that the declaratory power is inconsistent with the principles of federalism; they wanted the power removed from the Constitution, or at least limited to transportation and communications. The western provinces, in particular, were worried that the declaratory power could be invoked to undermine provincial control of natural resources. Shortly after World War II, for example, the federal government had used the declaratory power to bring uranium mines under federal jurisdiction. The fear now was that Ottawa might employ the same power to bring oil and natural gas under its jurisdiction.

At the outset, the federal government was not willing to abolish the declaratory power, but at the November 1978 conference it did propose that:

(i) the federal government must consult with the appropriate province before invoking the power

(ii) if no bilateral agreement was achieved, the matter would have to be discussed at a First Ministers' Conference for resolution before Parliament could act

(iii) then Parliament would be free to act, but for only five years, after which consultations would start again.

In the course of the negotiations on natural resources, the provinces recognized that anything they might gain from amendments to the Constitution could be undone by the exercise of the declaratory power. To help achieve a consensus, the federal government modified its original position and agreed to a draft provision, which required that provincial consent be given before the declaratory power could be exerted on the question of resources. It should be noted that the federal proposal was subject to an agreement on the question of resources.

The five issues previously outlined were the principal ones negotiated by the Continuing Committee of Ministers. The most time-consuming but least controversial was to develop an acceptable definition of "primary production." Early agreement on a clause prohibiting discrimination on price and supply helped speed on the negotiations. The most contentious issue remained the extent to which provincial jurisdiction over trade and commerce would be expanded.

In the course of the CCMC negotiations in 1978-79, the federal government moved to accommodate the provincial governments on certain matters. It agreed to state clearly that the provinces had exclusive jurisdiction over the exploration, exploitation, conservation and management of non-renewable resources, including the rates of primary production. It agreed to expand provincial jurisdiction to include *any* mode or system of taxation in respect of non-renewable resources and their primary production. It further agreed to increase provincial jurisdiction over interprovincial trade, subject to federal paramountcy and a non-discrimination clause. Finally, Ottawa agreed to a limit on its declaratory power. By the time of the February 1979 First Ministers' Constitutional Conference, the main stumbling-blocks were to do with which "test" should be established to trigger the exercise of the federal government's paramount legislative authority over trade and commerce in relation to natural resources, and whether the proposed provincial jurisdiction should extend to international trade.

### *(5) First Ministers' Conference, February 1979*

The First Ministers' Conference on the Constitution was held in Ottawa on 5 and 6 February 1979. The CCMC presented to the First Ministers a set of "best effort" drafts — so-called because they were the result of a joint federal-provincial effort and reflected the progress that had been made in the constitutional negotiations. One of the drafts, dealing with natural resources, is important because it has come to be regarded as the first draft of what is now section 92A.

The intergovernmental negotiations on natural resources must be considered within the context of the general constitutional review. In 1979, natural resources was one of fourteen subjects being studied. The discussions on other items, such as the declaratory power, offshore resources, indirect taxation, and the amending formula, had direct implications for the negotiations on natural resources. In addition to possible new constitutional provisions to do with natural resources, Alberta insisted that proprietary rights should be specifically protected in any amending formula.

During the conference, Saskatchewan's premier, Allan Blakeney, accepted the "compelling national interest" test for federal paramountcy in respect of interprovincial trade, but expressed dismay that the provinces would have no role in international trade. He was looking for answers to two questions. Could the federal government compel exports of natural resources in the "national interest"? Could the federal government establish a price lower than the domestic price for exports of natural resources? Until he received satisfactory answers, Premier Blakeney was not prepared to abandon the search for a provincial role in international trade. Saskatchewan acknowledged that the proposed change respecting indirect taxation and the ability to legislate on interprovincial trade in resources did go some way towards resolving the jurisdictional problems in the resource field, but this did not meet all its objectives. From the federal government's perspective, the proposed changes mitigated the effects of the decisions of the Supreme Court of Canada in the CIGOL and Central Canada Potash cases, at least with respect to interprovincial trade.

Premier Lougheed of Alberta expressed his dissatisfaction with the "best effort" draft on interprovincial trade in resources. Alberta wanted a stricter test for federal paramountcy than "compelling national interest" and proposed, as a test, "a crisis of substantial proportions resulting from a shortage," referring to, for example, the supply of oil or other sources of energy. How would the courts deal with a parliamentary declaration of "compelling national interest," which was thought to be a less stringent test than an "emergency"? It should be noted that, although Alberta and Saskatchewan adopted different positions regarding the exercise of federal paramountcy, the two provinces were united in the view that the exercise of federal jurisdiction had to be restrained in some way.

Prime Minister Trudeau, responding to the premiers' disquiet over federal paramountcy concerning trade in natural resources, argued that the proposals of the "various [petroleum-producing] provinces could destroy the Canadian economic union." The producing provinces argued that a provincial role in the interprovincial trade of resources did not endanger the Canadian economic union, and suggested that any constitutional amendment on resources should include provisions to ensure that there was no discrimination among the provinces with respect to price and supply. Nevertheless, no agreement was reached on this matter. A detailed discussion on the other aspects of the 1979 "best effort" draft did not take place, and the conference ended without an agreement on natural resources. While concern for the economic union did not dominate the federal government's position in February 1979, it gave a hint of what would become the focal point of subsequent negotiations.

## *(6) The Hard Bargaining Begins*

During the spring of 1980, the nation was embroiled in a "crisis of Confederation," as the people of Quebec approached their May referendum on sovereignty-association. In April, in a speech to the House of Commons on the Address from the Throne, Prime Minister Trudeau talked about "the enemy within," a reference to a conflict of loyalties between regional interests and the national interest. While much of his speech referred specifically to the Quebec referendum, there were allusions to energy pricing and to the sharing of benefits from natural resources across the nation.[17] He said:

> That is the enemy within — when loyalties are no longer to the whole but there is a conflict in loyalties; when we seek protection of our wealth, our rights or our language not in the whole country but in a region or a province of that country.[18]

There should be no doubt that his message was directed at a much larger audience than the people of Quebec. Another theme of the speech, while not referred to as such, was the economic union, a subject added to the agenda for the next round of constitutional negotiations.

By that spring, sentiments of alienation were intensifying in the West. In the February federal election, only two Liberals from western Canada had been elected to Parliament. No Liberals were elected in the three westernmost provinces, which increased concerns that the federal government could not and would not adequately reflect the region's needs and interests. Furthermore, the federal-provincial energy agreements were due to expire in June 1980. Because of the collapse of the Clark government in December 1979 and the re-election of the Liberals two months later, the energy negotiations between the federal government and the petroleum-producing provinces were stalled, raising more anxieties about provincial control of natural resources and a sense of frustration over the West's future economic development. During this period, the Western Canada Concept, a political party with a separatist policy, had begun to organize, primarily in Alberta but with some followers in the other three western provinces.

The federal government and the nation were caught between the impending referendum in Quebec and mounting western disaffection.

In May, Quebecers voted against the sovereignty-association proposal requested by the Lévesque government. At a one-day First Ministers' Conference in June, called by the prime minister to set an agenda for a resumption of negotiations, the Continuing Committee

of Ministers on the Constitution was re-established and became known colloquially as CCMC II. First Ministers agreed to an agenda consisting this time of twelve subjects, one of which was natural resources. Of these dozen items, all but one — the economic union — had been discussed previously.[19]

The tenor of the constitutional discussions changed dramatically between 1979 and 1980. The federal government, fresh from its "defeat" of Quebec separatism and with a strong new mandate, adopted a fundamentally different approach to constitutional negotiations — more strident and uncompromising than before. For their part, the provinces saw little scope for give and take in Ottawa's position. The "renewed federalism," promised by the federal government during the Quebec referendum, would, they thought, be difficult to achieve.

At the outset of the deliberations, the federal government took the position that negotiations had to begin anew on the natural resources question. Provincial governments were told that the 1979 "best effort" draft on resources was no longer on the table. The provincial premiers had assumed erroneously that the resumption of discussions would deal with the draft agreement prepared in 1979. However, Ottawa did not feel bound to its former position; in its view, the entire matter was subject to renegotiation. Restrictions on the exercise of the federal declaratory power in relation to natural resources were removed as a matter for negotiation, since the declaratory power had not been included in the twelve items to be reviewed during the summer. Despite the provinces' insistence, the federal government was not willing to discuss this particular subject.

The federal government wished to develop a draft amendment that would ameliorate the consequences of the court decisions in the CIGOL and Central Canada Potash cases. Saskatchewan maintained that such an amendment would not overcome their objections over international trade, while Alberta argued that the amendment would not provide the provinces with sufficient protection in interprovincial trade. In essence, the petroleum-producing provinces were seeking a broader amendment than the federal government was prepared to consider.

What complicated the negotiations on resources in 1980 was the federal government's determination to link the natural resources agenda item (a provincial concern) to the agenda item on powers over the economy (a federal concern). Ottawa seemed adamant that there could be no movement on one without the other. The provinces argued that the two items were independent and, therefore, should be considered separately. Throughout the summer, the provincial governments attempted unsuccessfully to have the federal government

consider and support the "best effort" draft of 1979. At the final CCMC II meeting, Ottawa offered to put a limited version of the 1979 "best effort" resources draft back on the table, but only if the provinces agreed to support a federal proposal for an amendment on "powers over the economy." The "limited version" made no reference to the declaratory power, had no "compelling national interest" test, and extended provincial jurisdiction only to interprovincial trade with federal paramountcy.

The provinces were being asked to consider and accept proposed amendments on resources that were less advantageous to them than those recommended by the CCMC in 1978-79. At the same time, provincial governments were told they had to accept an amendment on "powers over the economy," which would have expanded federal jurisdiction considerably. They did not view the two issues as sufficient reason for a *quid pro quo*. Yet there could be no movement on the resources question unless the provinces agreed to federal proposals on the economy.

### *(7) First Ministers' Conference, September 1980*

The First Ministers' Conference on the Constitution, held in September 1980, was a failure of classic proportions. Laden with acrimony on both sides, the conference was unable to produce the consensus for which everyone had been searching. The leak of the so-called "Kirby memorandum," which outlined a possible federal negotiating strategy for the conference, increased the feeling of uncertainty and precipitated a sense of impending doom.

The subject of natural resources was the first item to be addressed after the premiers' opening statements. It was a brief and inconclusive discussion. The prime minister, who spoke first, reiterated the connection between constitutional changes over natural resources and powers over the economy: "Any movement we can make in the direction of giving more powers to the provinces in trade beyond their borders must be counterbalanced or checked by sections in the constitution which will strengthen and reassert the existence of the common market." While the federal government was prepared to give the provinces concurrent jurisdiction over exports of natural resources in interprovincial trade, with federal paramountcy, it was unwilling to grant them legislative authority on international trade. The federal government viewed the proposed modification to its trade and commerce power, Pierre Trudeau said, as a "concession...not made lightly."

The natural resources draft amendment, forwarded to the first ministers for consideration at the September conference, was based

primarily on the work done in 1979. The earlier agreements on the definition of primary production, non-renewable resources and taxation remained, as did the areas of disagreement over the "best effort" draft. To compound the difficulties, the limits on the declaratory power, agreed to previously, had been scratched. If the earlier drafts had not been acceptable to the western provinces in 1979, the more limited version of 1980 was even less so. Moreover, the chances of reaching agreement on natural resources were further reduced because Ottawa continued to conjoin it with the item on "powers over the economy." The two sides were not even close to an agreement on this second subject.

Provincial reaction to the federal proposal varied, but it was clearly unsatisfactory to the four western provinces. Premier Blakeney pressed for the inclusion of international trade and the declaratory power, and a return to the "compelling national interest" test. Alberta did not view the federal position as a "concession," but as a limited response to provincial concerns.

Despite a week of discussions, both in public and behind closed doors, the 1980 Constitutional Conference did not reach agreement on the question of natural resources or, for that matter, on any of the other eleven subjects. Although a number of premiers suggested that there be a "cooling-off" period, after which discussions could soon be resumed, the federal government apparently had had enough of negotiation.

## *Unilateral Action, Patriation and Section 92A*

### *(1) The Federal Resolution*

After the failure of the September conference, on 2 October the prime minister announced that the federal government intended to proceed unilaterally to patriate and amend the Constitution. Amendments on resources were not included in the Resolution tabled in Parliament four days later. The decision to move unilaterally reduced federal-provincial relations in the West to an all-time low. They were driven even lower when the minister of finance, Allan MacEachen, brought down his budget on 28 October. The budget incorporated the National Energy Program, which moved the federal government further into the resource field. The NEP was seen by the three western provinces as a major assault on provincial ownership and jurisdiction over resources.

Although the National Energy Program was tabled as a budget document on 28 October 1980, it had been prepared by the Depart-

ment of Energy, Mines and Resources. Arguing that there were still problems in the energy field and that a consensus on energy agreement had not been achieved by either the Clark government or the new Liberal government, the federal government was required to move unilaterally to protect the national interest. Marc Lalonde, the minister responsible for energy matters, wrote:

> Accepting its national responsibility in the energy area, the Government of Canada has therefore decided that it must act now, and that it must act in a manner that fully recognizes the special circumstances surrounding energy.

Such considerations have dictated the three precepts of federal action:

- it must establish the basis for Canadians to seize control of their own energy future through *security* of supply and ultimate independence from the world oil market
- it must offer to Canadians, all Canadians, the real *opportunity* to participate in the energy industry in general and the petroleum industry in particular, and to share in the benefits of industry expansion
- it must establish a petroleum-pricing and revenue-sharing regime that recognizes the requirement of *fairness* to all Canadians no matter where they live.[20]

The reaction to the National Energy Program from the petroleum-producing provinces, especially Alberta, was swift and strong. On 30 October, Premier Lougheed delivered a province-wide television address, in which he condemned the "discriminatory and harsh federal measures." The following quotations from his speech give some understanding of his anxiety:

> ...the federal budget and energy measures...are an outright attempt to take over the resources of this province....What we are facing here is a situation where more and more decision making, more and more control, will be in the hands of the decision makers in Ottawa and your provincial government will become less and less able to influence your future and to provide for job security and opportunity....What we have done is we have developed a strategy to use our oil and gas as a lever to strengthen our economy, to create jobs, to develop a diversified economy....I can only surmise that Mr Trudeau wants to see control over Alberta's resources essentially in the hands of Ottawa....
>
> At the same time — when we look at motives — we have the constitution proposals that are before the country. I am concerned-

> ...that those constitutional proposals through an amending formula make Albertans and provinces, other than Ontario and Quebec, into second class citizens by permitting amendments to the constitution that could complete the takeover of our resources which are now being engineered on a pricing and taxation basis....they could attempt to use their so-called "emergency powers" under the Constitution to take over our resources.[21]

Throughout the fall and winter of 1980-81, the federal government continued to seek support from the provinces and within Parliament for its proposal to unilaterally patriate and amend the Constitution. Negotiations between Prime Minister Trudeau and the leader of the New Democratic Party, Ed Broadbent, during November and December 1980 led to a "deal" on the federal government's constitutional package.[22]

In exchange for the support of the NDP caucus in the House, the prime minister agreed that the government would recommend the addition of a natural resources section to the Resolution then being reviewed by a special joint parliamentary committee.[23] In mid-February 1981, when the committee presented its report, the Resolution tabled in October had been amended to include a part on natural resources — section 92A. The resources section ultimately would give the provinces jurisdiction over the indirect taxation of natural resources and concurrent jurisdiction over interprovincial trade in resources, with unconstrained federal paramountcy — those parts of the 1980 draft amendment that had been acceptable to the federal government. No measure of provincial legislative authority in the international trade of natural resources was to be part of the deal.

Saskatchewan's Allan Blakeney, a New Democrat, was not persuaded by the federal gambit. His government thought that the proposed resource provisions did not go far enough to accommodate provincial concerns over the control and management of natural resources. Saskatchewan wished to return to the 1979 "best effort" draft. The provincial government had earlier outlined its position in a presentation to the special joint parliamentary committee. The fundamental differences between the preferred Saskatchewan position and the provisions eventually included in the Resolution were: i) a return to the "compelling national interest" test for the exercise of federal paramountcy; ii) inclusion of some provincial jurisdiction in the international trade of natural resources; and iii) restrictions on the use of the federal declaratory power.

The "middle road" to establishing a consensus on the Resolution, for so long advocated by Premier Blakeney, became a lonely one. Most of the other provinces disapproved of Saskatchewan's attempts to

modify the federal package. The addition of a resources section in the Resolution would not overcome the deep-seated opposition of the three other western provinces to many of the provisions in it. Alberta, Manitoba and British Columbia believed that the premiers should concentrate on having the Resolution declared unconstitutional.

So, the "middle road" became a footpath, perhaps more accurately a tightrope, as last-minute, secret negotiations continued to secure Saskatchewan's support for the federal package. They failed. Bilateral negotiations between Ottawa and Saskatchewan embraced the entire Resolution on the Constitution but, although some important new provisions with respect to natural resources were proposed, the agreement fell apart, primarily because the two governments could not agree on an appropriate role for the Senate in the amending formula. With that failure, in mid-February Saskatchewan joined the other provinces in opposing the Resolution and patriation of the Constitution.

### *(2) The "Gang of Eight"*

During February and March of 1981, under the chairmanship of Manitoba, the provincial governments opposed to unilateralism were meeting to determine their options. Ontario and New Brunswick supported the federal package. The other provinces, popularly known as the "Gang of Eight," opposed it. On 16 April 1981, these provinces signed an "Eight Province Accord" on the Constitution; it proposed immediate patriation, an amending formula and constitutional discussions over the next three years.

Throughout the spring, the eight provinces also challenged the federal government's initiative in the courts. At the end of September, the Supreme Court of Canada announced its historic decision,[24] ruling that the federal unilateral action was legal in the strictest sense, but "unconstitutional in the conventional sense." The Court also stated that the "process offends the federal principle"[25] by failing to secure provincial consent to the Resolution.

### *(3) Final Negotiations*

The Supreme Court's decision effectively forced the federal government back to the bargaining table. A First Ministers' Conference on the Constitution was held in early November 1981. Opening the conference, the prime minister proposed that the agenda be limited to patriation, the Charter of Rights and Freedoms, and an amending formula. Although the other subjects of constitutional reform that

had been addressed up to that point were discussed during the conference, they did not become a focal point of the negotiations.

For the "Gang of Eight," the key to the negotiations was the provincial patriation plan. As its centrepiece, it had an amending formula based on the principle of provincial equality. The amending formula had originally been proposed by Alberta at the February 1979 Constitutional Conference. The critical component in the formula was section 38(2) — the "opting out" section — which provides that any amendment to the Constitution "that derogates from the legislative powers, the *proprietary rights*, or any other rights or privileges of the legislature or government of a province...shall not have effect in a province the legislative assembly of which has expressed its *dissent* thereto." The amending formula would clearly protect the proprietary rights and legislative authority of all provinces. Any individual province wishing to maintain and preserve its constitutional responsibilities could do so.[26]

At the November 1981 First Ministers' Conference, two documents were on the table. The first was the 16 April constitutional accord of the "Gang of Eight," containing the preferred provincial amending formula. The second was the October 1980 Resolution that had been debated extensively both in the House of Commons and in the joint parliamentary committee. It contained the Charter of Rights and Freedoms, the federal government's preferred amending formula, section 92A on natural resources and certain other provisions. It should be noted that, beginning in early September with Alberta, energy agreements had been signed with Alberta, Saskatchewan and British Columbia, but these had no direct influence on the constitutional negotiations.

Section 92A and natural resources were not singled out for discussion during the November conference because the First Ministers were concentrating on patriation, an amending formula and a Charter of Rights and Freedoms. Section 92A, while not fully accommodating the provinces, did represent a step in that direction. But an amending formula, and the very significant protection the provincial formula extended to proprietory rights over natural resources and the existing division of powers, were far more important.

The basis of the Constitutional Accord of 5 November 1981 was the acceptance of the provincial amending formula by the federal government and provincial acceptance of the federal government's Charter of Rights and Freedoms. The Constitutional Accord, signed by every province but Quebec, also asserted that "...the provisions of the Act now before Parliament relating to Equalization and Regional

Disparities, and Non-Renewable Natural Resources, Forestry Resources and Electrical Energy" were to be included in the constitutional amendment. On 17 April 1982, *The Constitution Act, 1982*, including section 92A, was proclaimed.

## *An Assessment of Section 92A*

Alberta and Saskatchewan took the lead in the discussions on natural resources and the Constitution, in large measure because they believed that their jurisdiction and proprietary rights were being eroded by Ottawa. What objectives of the western provinces, particularly Alberta and Saskatchewan, were finally realized when section 92A became part of the Constitution?

(i) provinces confirmed their exclusive legislative authority over a) the exploration of non-renewable resources; b) the development, conservation and management of non-renewable resources and forestry resources, including the rate of primary production; and c) the development, conservation and management of sites and facilities for the generation and production of electrical energy
(ii) provinces gained jurisdiction over the indirect taxation of resources, provided that these taxes do not discriminate between provinces
(iii) provinces gained concurrent jurisdiction over interprovincial trade in resources, provided that there is no discrimination in price or supply among provinces, and with unfettered federal paramountcy
(iv) outside section 92A, the new amending formula protects both provincial jurisdiction over natural resources and proprietary rights. Under the formula now in the Constitution, no amendment affecting an individual province's proprietary rights or its jurisdiction over natural resources can be imposed upon it without that province's consent.

However, the provinces failed to achieve three other objectives:

(i) provinces did not gain jurisdiction over international trade in resources
(ii) no limits were placed on the exercise of federal paramountcy over interprovincial trade in resources (such as "compelling national interest" or "national emergency")
(iii) no limits were placed on the federal government's declaratory power in relation to natural resources.

While section 92A did not fully meet the wishes of the western provinces, neither Saskatchewan nor Alberta actively sought to have that section, as drafted, included in the Resolution. Given the battles that followed the tabling of the Resolution in the fall of 1980 and the constitutional crisis of November 1981, the inclusion of section 92A in the final agreement was a significant accomplishment. At the September 1980 Constitutional Conference, the resources section now found in the Constitution was referred to by the federal government as a "concession"; it would be included in any reform package *only* if the provinces agreed to accept an amendment that would increase federal powers over the economy. In November 1981, no such *quid pro quo* was even suggested. While the resource provision became part of the 1981 constitutional agreement, it was not the objective of the agreement.

Thus, if one considers the circumstances that led to section 92A being incorporated in the Constitution, the western provinces came out ahead. They not only obtained a favourable amending formula, which protected provincial jurisdiction over natural resources and proprietary rights; they also managed to confirm and clarify their existing jurisdiction over natural resources. Perhaps most important of all: the provinces achieved an extension in the scope of their legislative authority over natural resources, *without* having to agree to greater federal jurisdiction over the economy.

## *Notes*

1. Hon. Kim Thorson, Minister of Mineral Resources. *Debates and Proceedings*, Hansard, 4th Session, 17th Saskatchewan Legislature, 12 December 1973, pp. 460-9, at 467-9.
2. This policy change was one of a number announced by the prime minister. See House of Commons, *Debates*, 16 December 1973, pp. 8478-83.
3. See the text of a speech by Prime Minister Trudeau announcing the agreement, House of Commons, *Debates*, 28 March 1974, p. 933.
4. *Western Premiers' Task Force on Constitutional Trends, Third Report*, March 1979, p. 15.
5. House of Commons, *Debates*, 6 May 1974, p. 2079.
6. *Central Canada Potash Company Ltd. and Attorney General of Canada v. Government of Saskatchewan*, [1979] 1 S.C.R. 42.
7. *CIGOL v. Government of Saskatchewan*, [1978] 2 S.C.R. 545. For a critique of the Potash and CIGOL decisions, see W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism", (1980) 18, *Osgoode Hall Law Journal*, p. 1.
8. *CIGOL v. Government of Saskatchewan*, p. 592-93.

9. Communiqué 2: "Constitutional Reform: The Position of the Provinces," in the *Sixth Annual Report*, Alberta Federal and Intergovernmental Affairs, October 1979, p. 45.
10. *Ibid.*, p. 66.
11. Opening Statements, First Ministers' Conference, 30 October 1978, Verbatim transcipt, Canadian Intergovernmental Conference Secretariat, pp. 95-96.
12. The fourteen topics were: resource ownership and interprovincial trade; indirect taxation; communications; the Senate; the Supreme Court of Canada; family law; fisheries; offshore resources; equalization and regional development; a Charter of Rights and Freedoms; spending power; declaratory power; an amending formula, "Patriation" of the Constitution and delegation of legislative authority; and the Monarchy. The ordering of agenda items was agreed to by Ministers at the first meeting of the Continuing Committee of Ministers on the Constitution on 23 November 1978. At the February 1979 conference, the first subject discussed after the opening statements was "resource ownership and interprovincial trade."
13. "An Agenda for Change: Notes for Comments by the Prime Minister of Canada, 31 October 1978," Ottawa Conference Document No. 800-8 051, pp. 5-6.
14. "Draft: Alberta Submission on Natural Resources, November 1978, to Federal-Provincial Continuing Committee of Ministers on the Constitution", *Documents and Record of Decisions*, CCMC, Mont Ste Marie, Quebec, 23-25 November 1978.
15. Document 830-65 011 *Documents and Record of Decisions*, CCMC, Mont Ste Marie, Quebec, 23-25 November 1978.
16. At these conferences, governments were also reviewing the general question of allowing provinces access to the field of indirect taxation, a subject that had been debated in earlier constitutional gatherings. On the broader question of provinces levying indirect taxes, it was generally recognized that the administrative problems associated with confining the taxes to the provinces establishing them were extensive; for that reason, the matter was not pursued.
17. For the full text of the prime minister's speech, see House of Commons, *Debates*, 15 April 1980, pp. 31-37.
18. *Ibid.*, p. 33.
19. Indirect taxation, the declaratory power and the Monarchy were deleted from the agenda. It had been recognized in February 1979 that, apart from changes to natural resource taxation, no further changes in the field of indirect taxation were needed. No explanation was given for the deletion of the other two subjects. For the agenda and schedule of meetings, see House of Commons, *Debates*, 10 June 1980, pp. 1977-78.
20. *The National Energy Program*, Government of Canada, 28 October 1980, p. 2.
21. Quotations are all from a transcript of Premier Lougheed's address to the province of Alberta in reaction to the federal budget, 30 October 1980. Specific page references have not been given.

22. Mr Broadbent, however, was unable to convince the majority of his Saskatchewan caucus members to support the package, even with the inclusion of a section on national resources.
23. The committee began its deliberations on 6 November 1980.
24. In *Re: Amendment of the Constitution of Canada*, (1981), 125 D.L.R. (3rd) p. 1.
25. *Ibid.*, p. 115.
26. During the 1978-79 constitutional discussions, the federal government came to recognize that provincial jurisdiction over natural resources should somehow be protected within the amending formula. One proposal was that any such an amendment should be subject to a unanimity rule. The concept of protecting provincial jurisdiction over natural resources was not reflected in the amending formula endorsed by the federal government in the fall of 1980. There was no suggestion that amendments affecting resources should be treated differently from any other amendment. In short, the amending formula in the Resolution proposed by the federal government provided no protection on natural resources.

# 2: The Legal Effect of the Resource Amendment — What's New in Section 92A?

*William D. Moull*

## *Introduction*

The resource amendment to Canada's Constitution, section 92A, came into force on 17 April 1982, along with the rest of the constitutional patriation package.[1] It was introduced largely to counteract the perceived effects of two Supreme Court of Canada decisions in the late 1970s—*CIGOL*[2] in November 1977 and *Central Canada Potash*[3] in October 1978. Its significance can be judged in part by the fact that it was the only element of the package that purported to alter the balance of federal-provincial legislative powers.[4]

The preceding paper has described the process by which section 92A came into being. Here, the legal effect of the resource amendment will be assessed in the light of the previous constitutional powers of the federal and provincial governments, to determine whether section 92A really contains anything new for the resource-producing provinces. For instance, to what extent does section 92A confer new powers on provincial governments; and to what extent does it merely confirm their pre-existing powers? Correspondingly, to what extent are federal legislative powers reduced either expressly or by implication? And to what extent can fresh policy initiatives be expected in Canada's four western provinces as a result of its introduction?

This paper concentrates on the implications of section 92A for the western provinces. This is not intended to imply that it will have no effect elsewhere in Canada, for indeed it may. Newfoundland, for example, may find that the powers conferred by section 92A are helpful in its continuing dispute with Quebec over the export to that province of Churchill Falls power. But since section 92A came into

the Constitution largely because of the pressures exerted by the governments of the western provinces after the *CIGOL* and *Central Canada Potash* decisions, it is appropriate to evaluate it in the light of its potential consequences for those particular provinces.

This paper will first discuss the scope of section 92A in general, describing the kinds of resources and the kinds of governmental powers to which it applies. Then the legal effect of section 92A will be examined in more detail.

## *The Scope of Section 92A*

No matter what else it may accomplish, section 92A does entrench in the Constitution a set of provincial legislative powers over natural resources. This does not necessarily mean, of course, that everything in section 92A is new. But it does mean that a conscious step has been taken to place those powers in the Constitution in a deliberately specific way. As part of the Constitution, the powers set out in section 92A are now part of the "supreme law of Canada."[5] They can be altered or taken away only by resort to the new amending formula, which was also part of the 1982 constitutional patriation accord.[6]

The general outlines of section 92A are readily apparent, although its precise legal scope will have to be determined by the courts. As a new part of the Constitution, section 92A will be subject to judicial interpretation—and reinterpretation—as specific cases are brought before the courts. No present-day analysis of section 92A can be definitive, therefore, because it is impossible to predict exactly what the courts may read into it, or read out of it, in the years to come.

Section 92A is unusual for a constitutional instrument because of its relatively detailed nature.[7] It employs terms that are more technical than is common in a constitution. This reliance upon a more specialized language may help the courts in some instances to see the meanings that were intended by those who framed section 92A. In other places, however, the task of the courts in settling the section's scope may be complicated by some of the interpretative difficulties introduced by this style of legislative drafting.

These considerations all play their part in defining the scope of section 92A and the kinds of resources and governmental powers to which it applies.

### *(1) Kinds of Resources*

Section 92A does not define clearly the resources it encompasses. Three kinds of resources are mentioned: "non-renewable natural

resources," "forestry resources," and "sites and facilities...for the generation and production of electrical energy." The section does not define these terms, although a new Sixth Schedule to the Constitution specifies what constitutes the "primary production" from a "non-renewable natural resource" and a "forestry resource." Consequently, it will be up to the courts to explain these terms more particularly.

As a rule, "forestry resources" denotes standing trees. Wherever it is used in section 92A, the context suggests that it means timber *before* it has been cut and not afterwards. However, portions of section 92A also speak of provincial legislative powers in relation to the "primary production" from forestry resources. Cut timber is thus within the scope of section 92A as a subject-matter on its own account.

Similarly, it seems that any type of "site or facility" that generates electrical energy is referred to in the section regardless of how that electrical energy is generated. This would encompass hydro-powered facilities, as well as those fired by coal, oil, natural gas or nuclear energy. Again, some portions of section 92A specifically refer to provincial legislative powers in relation to the "production" from those facilities as a separate subject-matter, apart from the facilities themselves.

A more difficult phrase, however, is "non-renewable natural resources." It is not defined either, but appears to encompass all resources that are not ordinarily renewable by the processes of nature or man; thus it subsumes hydrocarbons and minerals such as oil, natural gas, coal, potash and uranium. Correspondingly, the phrase apparently excludes anything that is ordinarily "renewable," such as water, wildlife and agricultural land. The only renewable resources contained within the scope of section 92A seem to be forestry resources, which are mentioned specifically.

The way in which section 92A is framed indicates that "non-renewable natural resources" refer to resources such as hydrocarbons and minerals in their natural state—*in situ*. Yet some parts of the section speak of the "primary production" from these resources. For example, subsection 92A(2) is concerned with the export of the "production" or "primary production" from resources, rather than the resources themselves. Resource production is thus a distinct focal point of section 92A, over and above the resources themselves in place.

Section 92A does not elaborate upon what constitutes "production" from an electrical energy facility, so the product in this case must simply be electrical energy. However, it does define what is meant by the "primary production" from forestry resources and non-renewable natural resources. Pursuant to subsection 92A(5), that definition is set out in a new Sixth Schedule to the Constitution:

1. For the purposes of section 92A of this Act,
   (a) production from a non-renewable natural resource is primary production therefrom if
      (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
      (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
   (b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

The Sixth Schedule does not purport to describe the many forms that resource "production" may take. It starts from the premise that one knows what "production" is, and then tries to say at what point that "production" ceases to be "primary" production (and thus ceases to be within the scope of section 92A). Production is "primary" in its raw or natural state, as one would expect, and will generally remain "primary" through the processing and refining of the raw product up to (but not including) the point at which a "manufactured product" results. The one exception to this general rule is a product that results from refining crude oil or certain listed equivalents of crude oil. Such a product ceases to be "primary" production for the purposes of section 92A as soon as the raw resource is refined, even if a "manufactured product" is not the direct result of the refining process.

The effect of the wording of the Sixth Schedule is to give a broader scope to the term "primary production" than it might have had if it were not so defined. There are indications in the case law, for instance, that the courts regard "primary" production as being limited to the raw product obtained when the resource is first severed from its natural state.[8] The Sixth Schedule, then, extends the term's meaning beyond its usual judicial interpretation. For example, it includes within section 92A not only natural gas in its raw state but also any natural gas liquids that are separated from the gas when it is processed or refined. But the term "primary production" would not go so far as to include any "manufactured product" that may result from further refining of those natural gas liquids at a petrochemical facility.

This extended definition, however, will not be significant for a resource-producing province unless the refining, processing or manufacturing operations also take place within that province. In all cases, the scope of section 92A is limited to resources "in the province" and to the primary production from those resources in that province. A producing province will not be able to control the processing and refining of its resource production under section 92A if the product leaves the province in its raw or natural state and is processed or refined elsewhere. The broader definition of "primary production" in the Sixth Schedule thus gives no greater legislative reach to such a province than it would have had under a more limited definition of the term.

The restriction of the scope of section 92A to resources "in the province" also means that it does not apply to offshore minerals or other resources that, for constitutional purposes, are not "within" a province. In 1967, the Supreme Court of Canada held that the lands underlying the offshore area adjacent to British Columbia were beyond the boundaries of that province.[9] In March 1984, the Supreme Court reached a similar conclusion about the resources of the continental shelf that lies off Newfoundland.[10] To the extent that offshore resources do not "belong" to the adjacent province, and so are not, for constitutional purposes, within the province, they are outside the scope of section 92A. The same is true of any onshore resources—such as those found in the Yukon and the Northwest Territories—which are not within the boundaries of any established province.

## 2. *Kinds of Governmental Powers*

The constitutional treatment of natural resources in Canada can be divided readily into two aspects. First, who can raise revenues from resources and resource production, and in what ways? Second, who can regulate the development of resources, the production from those resources, and the marketing of that production? The dividing line between these two aspects is not always clear-cut, because taxation and other revenue-raising measures can have indirect regulatory effects (for example, modifications in tax rates that stimulate or deter development), and some types of regulatory schemes can have incidental revenue-raising effects (the imposition of significant licence fees, for instance). The intergovernmental debate on natural resources has largely treated these as two separate aspects, however, and section 92A itself follows the same pattern.

On the revenue-raising side, subsection 92A(4) deals with provincial taxation of resources and resource production. It allows a province to impose "any mode or system of taxation" on:

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
(b) sites and facilities in the province for the generation of electrical energy and the production therefrom.

This provision places the power to levy *indirect* resource taxes within provincial legislative jurisdiction for the first time, as will be discussed in more detail below. In the past, the provinces have had the power only to impose *direct* taxation on resources and resource production (or on anything else, for that matter). They were confined to using the forms of taxes historically recognized by the courts as "direct" taxes—land taxes[11] and income taxes[12] being two of the best examples in the resource field. This restricted taxation power contrasted markedly with the practically unlimited power of provincial governments, in their capacity as resource proprietors, to impose different forms of Crown royalties on resources from provincially owned Crown lands. Subsection 92A(4) seems broad enough to give the producing provinces resource taxation powers that are comparable to the Crown royalty powers they have enjoyed for many years.

Subsections 92A(1) and (2) pertain to provincial legislative powers to regulate resources. These subsections in part confirm the pre-existing provincial legislative powers, and partly expand those powers to include subjects that historically have been forbidden to provincial legislatures. As with revenue-raising measures, regulatory powers have traditionally been stronger when a province was able to exercise the rights that derive from Crown ownership of resources. Provincial *legislative* powers under section 92 of the Constitution, by contrast, were much more limited when a province attempted to regulate resources it did not own, or tried to treat all resources alike, without regard for their ownership. As is the case on the revenue-raising side, the regulatory powers that the producing provinces may now exercise in a legislative capacity will more closely approximate the powers that they have been able to exercise in their capacity as resource proprietors.

Subsection 92A(1) grants provincial legislative powers to make laws in relation to the following kinds of resource-related activities:

(a) exploration for non-renewable natural resources in the province
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, includ-

ing laws in relation to the rate of primary production therefrom, and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

This list of activities seems comprehensive, yet its lack of precision will require the courts to amplify its legal substance and meaning. On the one hand, the term "exploration" seems straightforward, probably having its usual sense of searching for resources. On the other hand, the phrase "development, conservation and management" presents something of a puzzle. Each of the three words can have several meanings, depending upon the legislative context in which it is invoked; the courts may have to explore those nuances in some depth. The meanings that the courts may give to these three words will be discussed in more detail below. On its face, however, subsection 92A(1) seems sufficiently broad to support any provincial law whose purpose and effect are primarily to regulate resources and resource production within the province.

Another regulatory aspect of the amendment, subsection 92A(2), addresses the question of provincial legislation that is intended to control the export of resource production from a province to another part of Canada. For the first time, it confers on the producing provinces an express jurisdiction to legislate:

> ...in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy....

This is concurrent provincial jurisdiction, shared with Parliament. The paramountcy of federal "export" legislation is expressly preserved by subsection 92A(3), so that, in a direct conflict, any provincial legislation relating to exports to another part of Canada would be subordinate to federal legislation. The new provincial jurisdiction does not extend to exports outside the country, since subsection 92A(2) is clearly limited to "exports" to other parts of Canada. The new provincial jurisdiction is also restricted by the non-discrimination proviso at the end of subsection 92A(2), which forbids any provincial laws that "authorize or provide for discrimination in prices or in supplies exported to another part of Canada." The possible meanings of some of these terms are discussed in more detail below. As a general proposition, however, subsection 92A(2) enhances

the scope of provincial legislative authority because laws governing the export marketing of resource production were formerly forbidden ground for provincial legislatures.[13]

In delineating the scope of the legislative powers conferred on the producing provinces by section 92A, it is important to note that those powers do not depend for their validity upon provincial Crown ownership of resources. However, the section does not take away any pre-existing provincial powers. Subsection 92A(6) provides that:

> Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

Accordingly, section 92A adds to provincial powers; it does not reduce them in any way. This applies, of course, to the previous legislative powers of the producing provinces in both revenue-raising and regulatory matters. But given the relatively limited scope of those previous legislative powers, the more important effect of subsection 92A(6) is to preserve unimpaired the pre-existing powers accruing to the governments of the producing provinces by virtue of their provincial Crown proprietary rights. In sum, the effect of section 92A is to bring the legislative powers of the producing provinces more closely in line with the scope of the powers that they have been able to exercise in the past in their capacity as resource proprietors.

## *The Legal Effects of Section 92A*

The above discussion has attempted to delineate the scope of section 92A in relation to the kinds of resources and the kinds of governmental powers it encompasses. What follows is a more detailed examination of the legal effect of section 92A in the context of the pre-existing division of legislative powers over resources between the federal and provincial orders of government.

### *(1) Raising Government Revenues from Resources*

Subsection 92A(4) expands provincial taxation powers by allowing provincial legislatures to levy indirect taxes on natural resources. It states:

> In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of:
> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

In comparison with the provinces, Parliament has always had very broad powers of taxation. The federal power to tax, found in section 91(3) of the Constitution, permits Parliament to raise money "by any Mode or System of Taxation." This provision allows Parliament to impose any type of tax it chooses upon natural resources, upon the production from natural resources, or upon the persons engaged in producing those resources. Over the years, the federal government has employed a variety of tax regimes for natural resources: oil export taxes;[14] the Petroleum and Gas Revenue Tax and the Natural Gas and Gas Liquids Tax implemented under the National Energy Program;[15] and the provisions of the federal *Income Tax Act*[16] applicable to income derived from resource production. All of these taxation powers remain within federal legislative jurisdiction to the same extent as before the enactment of section 92A, because subsection 92A(4) does not purport to give the provinces any new *exclusive* powers of indirect resource taxation.

Even before section 92A, the producing provinces also had certain broad powers to raise revenues from natural resources. These powers derived from the status of the provincial governments as proprietors of Crown-owned resources within their provinces under section 109 of the Constitution,[17] supplemented by their legislative powers under section 92(5) in relation to the "Management and Sale of the Public Lands" belonging to them. As resource proprietors, provincial governments have been able to exact almost any kind of Crown royalty they chose, and have enjoyed a great deal of flexibility in designing and implementing different types of Crown royalty structures.[18]

The power to exact Crown royalties does not apply, of course, to resources that are no longer owned by the provincial Crown, but have been conveyed away in freehold. This power has thus been far more useful in Alberta and British Columbia, where the proportion of Crown-owned resources is high (over 80 per cent),[19] than in Manitoba and Saskatchewan where, for historical reasons, the Crown-owned proportion is much lower on average (as low as 25 per cent in some oil- and gas-producing areas).[20] As far as privately owned (freehold) resources are concerned, the only means by which a province can raise revenues is through the exercise of its legislative powers of taxation.

Even when acting as proprietors of resources, provincial governments have not always had complete freedom of action in imposing royalties or changing royalty rates. This is evident from one aspect of the *CIGOL* decision.[21] Saskatchewan imposed a "royalty surcharge" on Crown oil production in late 1973, as part of its policy of capturing for itself the increase in crude oil prices that resulted from the Arab oil embargo. The provincial government argued that it was entitled to impose the surcharge in its capacity as proprietor of the resource, by virtue of Crown lease provisions permitting it to vary royalty rates from time to time. But the Supreme Court of Canada held that the way in which Saskatchewan had imposed the royalty surcharge meant that it was really a tax, not a royalty. As will be explained below, the royalty surcharge was invalid as a tax, principally because it was not "direct." While the proposition was not tested in court, some commentators have suggested that Alberta's revisions to its Crown oil royalty structure at about the same time might likewise have been characterized as being truly a taxation measure, and an indirect one at that, had those revisions been challenged by the oil industry.[22]

Provincial legislative powers to tax resources and resource production are thus an important basis for raising resource revenues. Before the introduction of section 92A, however, the provinces were restricted in the forms of resource taxation they could use. Section 92(2) of the Constitution gave the provinces only the power to levy "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes." This phrase imposed three important qualifications on a province's authority to tax resources. First, only "direct" taxes could be levied by a province. Second, these taxes had to be imposed "within the province." Third, the taxation power had to be used to raise provincial revenues, not for some other purpose.

Canadian courts categorize a tax as "direct" only if the general tendency of the tax is such that taxpayers who are required to pay it cannot normally pass it on in a recognizable form to someone else. As was noted above, land taxes and income taxes are two common categories that the courts traditionally treat as direct taxes.[23] Conversely, the courts consider a tax to be "indirect" if taxpayers normally can pass it on in a recognizable form to someone else. Types of taxes that the courts have traditionally found to be indirect include commodity and excise taxes, and indeed any taxes that are calculated as a share or percentage of the gross production from a resource or the gross revenue realized from the disposition of that production.[24] In *CIGOL*, for example, Saskatchewan's "mineral income tax" was struck down by the Supreme Court of Canada (along with the

companion "royalty surcharge" that the Court had found to be a tax) largely on the ground that it was an indirect tax. Its general tendency, the Court found, was that it would be passed on by producers of Saskatchewan oil to their customers as part of the purchase price.

Because section 92(2) stipulates that provincial taxation can be levied only "within the province," a province had to confine the principal burden of its resource taxation to persons or things found within its borders. A province could tax a thing (for example, a mine or well within its boundaries); or it could tax a person within its boundaries, even if the tax was to be calculated with reference to some extra-provincial standard (for instance, a tax imposed on a person within the province calculated on the basis of his or her worldwide resource income). However, a provincial tax on resource production destined for export would not be a tax levied "within the province" if someone outside that province would ultimately pay it.[25] The Supreme Court of Canada also reached this conclusion in *CIGOL*, since nearly all those purchasers of Saskatchewan oil who ultimately would bear the tax burden in the form of higher prices were outside Saskatchewan.

A province could only invoke section 92(2) for provincial revenue-raising purposes. Otherwise, the courts could strike down provincial taxation legislation (even though it was "direct" and was levied "within the province") if the true purpose of the "tax" was something other than simply raising revenue *and* that purpose was found to be primarily outside provincial jurisdiction. In two cases, British Columbia sought to encourage the development of local processing industries by imposing high rates of tax on raw resource production, with a rebate being available if the production was processed within the province.[26] While the tax component of each of these schemes might have been upheld on its own, it was clear to the courts that the real purpose of the larger tax-plus-rebate scheme was to prevent the export of unprocessed resource production from British Columbia. Such "export" taxes thus infringed upon federal jurisdiction over extra-provincial trade and commerce. Similarly, in *CIGOL*, the Supreme Court of Canada found that one of the purposes of Saskatchewan's tax regime was to set the price of Saskatchewan oil in extra-provincial markets, which purpose also intruded upon federal jurisdiction over trade and commerce.

The new subsection 92A(4) expands provincial legislative powers over the taxation of resources by reducing the fetters imposed by section 92(2) and the *CIGOL* decision. It now permits provincial legislatures to impose indirect taxation on resources within their province and, more importantly, upon the primary production from those resources. Subsection 92A(4) allows a provincial legislature to

impose "any mode or system of taxation" in the resource field. This phrase parallels the broad language of the existing federal taxation power under section 91(3). Under subsection 92A(4), the provinces will now be able to tax, by any form of taxation they may choose, both resources in place and the primary production from those resources.

The previous requirement that a province must impose its resource taxation only "within the province" has been relaxed under subsection 92A(4), but has not been abandoned. Any resources that are subject to taxation under this subsection must, by definition, be "in the province" imposing the taxation, so that a producing province can tax the primary production only from resources within its own boundaries. One province cannot tax another's resource production as it passes across the country; Alberta oil and gas, for instance, cannot be taxed by the provinces through which the pipelines run.

However, subsection 92A(4) explicitly allows indirect taxes to be imposed on resource production "whether or not such production is exported in whole or in part from the province." A provincial indirect tax on the production from a natural resource will not be held invalid merely because the product itself is exported from the province, and the tax is correspondingly "exported" in the sense that it will be borne eventually by a purchaser outside the taxing province. Subsection 92A(4) would have changed little had it authorized indirect taxation but still required the taxing province to confine the principal impact of its measure to its own boundaries.

Subsection 92A(4) ends with a prohibition against differential taxation of resource production that is exported from the province. It forbids taxation "that differentiates between production exported to another part of Canada and production not exported from the province." Accordingly, a province cannot enact legislation that taxes only production exported from the province to other parts of Canada and does not tax production used within the province. Nor can a province impose different rates of tax, depending on whether the product is to be consumed in the province or elsewhere in Canada.

At first blush, the language of this prohibition is curious: it applies only to taxation that differentiates between "production exported to another part of Canada" and "production not exported from the province." Nothing is said about production that is exported from the province *and* from Canada. This omission could lead one to the inference that a producing province *is* permitted to impose differential taxation (favourable or unfavourable) upon production that is to be exported from Canada.[27] For instance, it could be read in such a way as to allow Alberta to impose higher or lower rates of tax on natural gas production that is destined for export to the United States, than it imposes on natural gas production destined for use within Canada.

However, this may not be the correct reading. Subsection 92A(4) authorizes the making of laws only "in relation to" the subject-matter of taxation. The provision permits those laws to have an incidental effect on other subject-matters, such as the export of production from the province, in the sense that exported production can also be taxed. But a law that focusses upon production that is exported from Canada could well be classified by the courts as being, in essence, concerned with foreign trade rather than "taxation". Under subsection 92A(2), a producing province now has some powers to legislate "in relation to" the export of resource production from the province, but not outside Canada. Thus, a province still has no power to enact legislation that is directly aimed at or is "in relation to" the export of production from Canada, whether that legislation is in the form of "taxation" or of something else.

Under subsection 92A(4), then a province may tax resource production that is to be exported from the province as part of a general indirect taxation scheme applicable to the production from the resource within its boundaries. This new indirect taxation power can be applied to the "primary production" from both forestry resources and non-renewable natural resources in the province. It can also be applied to the production from electrical energy facilities in the province.[28] However, a province still cannot impose what amounts to "export" taxation at its borders, just as it could not under the general tax powers of section 92(2). Section 92A continues to prohibit not only outright "export" measures, but also combined tax-plus-rebate schemes that amount to "export" taxation. Differential taxation policies will therefore continue to be unavailable as devices to encourage the development of local processing, refining and manufacturing industries.

The new taxation power under subsection 92A(4) will allow the producing provinces additional flexibility in designing their forms of resource taxation, a degree of flexibility comparable to what they have enjoyed for many years in the formulation of Crown royalty structures. Royalties are often calculated as a share of gross production, and subsection 92A(4) will now allow a province to impose indirect production or commodity taxes calculated in much the same way. These taxes could be applied to all production from a particular resource in the province, since there is no longer the same need to distinguish between Crown and freehold production for revenue-raising purposes. Or perhaps these taxes could be applied only to production from freehold lands, as a counterpart to the royalty structure in place for Crown production.

These indirect taxes can be made to parallel the provincial Crown royalty system for a particular resource, thus reducing the administra-

tive burden for both government and industry that can come about because of two quite different revenue-raising systems for the same resource within a province. Saskatchewan has already taken two initiatives here. It has replaced its cumbersome oil well income-tax system for freehold oil production, implemented after the *CIGOL* decision, with a new statute that imposes an indirect production tax on all freehold oil produced in Saskatchewan on or after 1 January 1983.[29] It has also replaced the producing tract taxes, which it formerly imposed on other minerals, by introducing a series of new production taxes that became effective on 1 January 1984.[30] Other new statutes imposing indirect resource taxes could well appear in the western provinces in the future as provincial governments move to take advantage of their new freedom under subsection 92A(4).[31]

Even if that does not happen extensively, however, subsection 92A(4) has an interesting curative effect on the existing taxation regimes in those provinces. Land taxes on resources have been common in the past in all four western provinces because of their long-standing constitutional sanction under section 92(2).[32] Some of these are calculated at a flat rate per acre or hectare; others require the application of an assessment formula that represents a *bona fide* attempt to establish the value of the remaining recoverable reserves of the resource *in situ* as the subject-matter of the tax. Section 92(2) leaves little doubt about the validity of both these kinds of land taxes.[33]

In other instances, however, the required assessment procedure is based not upon the value of remaining reserves of the resource *in situ*, but rather upon the value of the production of the resource from those reserves during some stipulated period of time, such as the year for which the assessment is made,[34] or the year immediately before it.[35] Under section 92(2), a good argument could have been made that taxes of this type are invalid because they are really indirect taxes intended, albeit circuitously, to tax *production* from the reserves of the resource. But even if those taxes had been indirect all along, they have now found a safe haven in subsection 92A(4). Therefore, even if only a few new tax regimes are adopted by the producing provinces under subsection 92A(4), the potential for legal challenge to their pre-existing regimes has been reduced considerably by virtue of its introduction.

It must be emphasized, however, that subsection 92A(4) only enhances the *forms* of taxation available to the resource-producing provinces. It now permits them indirect taxation, as well as the direct taxation to which they were previously confined. Tax rates and the size of tax burdens in the resource field are not directly influenced one way or the other by subsection 92A(4). Those matters will continue to

be established by the policies of particular provincial governments and what they consider to be an appropriate share of resource revenues to capture for themselves. Subsection 92A(4) gives a producing province a simpler and more flexible mechanism through which to implement its taxation policies. It does not, in itself, dictate what those policies will be.

## *(2) The Regulation of Resources*

Section 92A deals with two matters that bear upon provincial resource-regulation powers. Subsection 92A(1) covers the control of resources and resource production within a producing province. Subsections 92A(2) and (3) address issues relating to the export of resource production from a producing province. Taken as a whole, these provisions represent a confirmation and an enhancement of the legislative powers of the producing provinces.

### (a) Within Provincial Boundaries

Subsection 92A(1) confirms the legislative powers of the producing provinces to regulate resources within their boundaries. In some respects it may also augment provincial legislative powers. Subsection 92A(1) reads as follows:

> In each province, the legislature may exclusively make laws in relation to
>
> (a) *exploration* for non-renewable natural resources in the province
>
> (b) *development, conservation* and *management* of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom, and
>
> (c) *development, conservation* and *management* of sites and facilities in the province for the generation and production of electrical energy. [emphasis added]

This catalogue of provincial legislative powers seems broad enough to encompass almost any kind of regulatory measure that a province might care to enact in respect of the specified resources within its boundaries. This is not to say, of course, that the provinces did not possess extensive powers over their resources before the constitutional amendment was enacted. They did, although their capacity as proprietors of provincial Crown lands, under section 109 of the Constitution, gave them significantly broader powers than did their pre-existing legislative capacity.

Before section 92A, a provincial government could exercise broad powers over Crown-owned resources within its jurisdiction that were its property under section 109.[36] The proprietary rights available by virtue of section 109 were supplemented by the legislative powers conferred by section 92(5), which gives the provinces the authority to legislate in relation to "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon." The broad powers exercised by the producing provinces under these sections were founded upon some older cases, which suggested that a province, acting in its capacity as proprietor, could do what any private proprietor of resources could do—and thus significantly more than it could do when it was acting solely in its legislative capacity.[37] Several commentators have raised serious questions about the constitutional solidity of these cases,[38] and particularly about their continuing persuasiveness in the eyes of the present Supreme Court of Canada.[39] There is no doubt, however, that the western provinces, particularly Alberta and British Columbia, have relied extensively upon their proprietary rights to regulate resources.[40] But this was to be expected, given the extent of Crown ownership of resources in those provinces, compared to Manitoba and Saskatchewan.[41]

Provincial reliance upon proprietary rights can be illustrated by examining one of Alberta's responses to the federal government's National Energy Program in late 1980. Alberta ordered progressive cutbacks in its output of oil, pursuant to a statutory authority earlier granted by an amendment to the Alberta *Mines and Minerals Act*.[42] These cutbacks were restricted, however, to Crown-owned oil pools, so that Alberta could rely upon its proprietary rights in those pools if the cutbacks were challenged in court. No such challenges were made, so the validity of Alberta's particular use of its proprietary rights was never tested in court. But the restricted scope of Alberta's oil cutbacks must be taken as indicating its implicit recognition that it might not have had the constitutional authority to apply them by legislation alone, either to freehold oil pools or, more importantly, as a general regulatory measure applicable to *all* oil pools in the province, without regard to their Crown or freehold ownership.

To regulate resources not owned by the provincial Crown, or to regulate a resource generally without regard to its ownership, a province had to resort to its general legislative powers under section 92 of the Constitution. These powers included:

(i) section 92(10), under which a province could legislate in relation to "Local Works and Undertakings"
(ii) section 92(13), under which a province could legislate in relation to "Property and Civil Rights in the Province"

(iii) section 92(16), the provincial residual power, under which a province could legislate in relation to "Generally all Matters of a merely local or private Nature in the Province."

There are two noteworthy features here. First, resource-related matters are not specifically mentioned in this list. To find constitutional support for a general resource-control measure, a province had to search for legislative authority in the unspecific words of section 92. Legislation regarding a mine or a well might fall within section 92(10) as a regulation of a local work and undertaking. A legislative measure that tried to restrict production rates might fall within section 92(13) as a matter of "Property and Civil Rights," or perhaps within section 92(16) as a matter of "a merely local or private Nature." But without express reference in the Constitution to legislative powers over resources, in each case there would be some doubt about a court's willingness to characterize a particular measure as falling within one or another of these heads of power.

Associated with this lack of specific reference to resources in section 92 was the fact that all its potential categories of power were confined to matters within the province. Under section 92, therefore, a province could enact legislation regarding general resource-regulation only "in relation to" intra-provincial subject-matters and for intra-provincial purposes. Its legislation had to be confined to effects and purposes primarily within the province's borders, although it would still be valid even if it might have some incidental consequences outside those boundaries. For example, a province could order a reduction in rates of production as a conservation measure intended primarily to prevent physical waste of a depleting resource within its borders, and it could do so even though reduced production rates might mean that exports of production from the province were correspondingly reduced.[43] But provincial legislation under section 92 could not be enacted principally to effect an extra-provincial purpose in the guise of an intra-provincial mechanism.

In *Central Canada Potash*, for instance, Saskatchewan contended that its potash pro-rationing scheme was a valid "conservation" measure dealing with a subject-matter within the province; the argument was that the purpose of the scheme was to "conserve" the Saskatchewan potash industry, and that the principal mechanism by which the scheme worked was a limitation on rates of production from potash mines in the province. The Supreme Court of Canada agreed that production controls and conservation measures were "ordinarily" within provincial legislative authority; but the Court held that, no matter what its mechanism, the real purpose and effect of the scheme were to reduce the quantities of Saskatchewan potash

entering the export market. In the view of the Court, the scheme had been established primarily to constrict the market for Saskatchewan potash outside provincial borders, and not primarily for any subject-matter within the province. Consequently, despite its form, the potash pro-rationing scheme was struck down by the Court.[44]

Subsection 92A(1) entrenches in the Constitution, for the first time, a comprehensive list of legislative powers that are specific to natural resources within a province, but which, unlike section 92(5), do not depend upon Crown ownership of resources for their constitutional validity. These are *general* legislative powers, and are thus available to a provincial legislature no matter what the pattern of ownership of a particular resource may be within the province. For example, they can be used to regulate freehold resources, or they can be used to regulate a resource generally without regard to whether that resource is owned by the Crown or in freehold. And to the extent that the present-day scope of the powers deriving from provincial Crown proprietary rights may be questioned, subsection 92A(1) now gives the provinces a separate and independent source of authority for those powers in respect of Crown-owned resources too.

These powers may still be exercised, however, only "in relation to" subject-matters within the province. In each case, subsection 92A(1) speaks of resources "in the province" when it mentions the kinds of resource-related activities that a provincial legislature can control by legislation. Accordingly, subsection 92A(1) does not authorize a province to enact measures that have as their primary (though, perhaps unstated) purpose the regulation of the marketing of resource production outside the province. There may now be some authority to do this by virtue of subsection 92A(2), as will be discussed below. But subsection 92A(1), on its own, authorizes only provincial legislation of principally intra-provincial purpose and effect.

There are several resource-related activities mentioned in the list of powers set forth in subsection 92A(1). The first is "exploration for non-renewable natural resources" in clause 92A(1)(a). There was never much doubt that a province had the ability, before section 92A, to regulate exploration for resources within its borders, either as an aspect of its powers over Crown-owned resources or under its previous legislative authority—section 92. Clause 92A(1)(a) therefore confirms the previous provincial jurisdiction, though now more definitively.

The "conservation" power relating to non-renewable natural resources is enshrined in clause 92A(1)(b), as part of the phrase "development, conservation and management." At the very least, its inclusion here confirms the previous provincial jurisdiction to enact conservation measures for the prevention of physical waste.[45] It has never been entirely clear, however, that provincial legislative

authority also extends to "economic" conservation, in the context of measures whose object it is to minimize economic, rather than physical, waste. Such an economic conservation measure might include, for instance, a production-control scheme that is designed to maximize the *economic* returns from the exploitation of a resource, by reducing the aggregate costs of producing its known recoverable reserves, rather than by increasing the total physical quantities of the resource recovered over time.[46] Because resource "conservation" is now an express category of provincial legislative power in its own right, the courts may be willing to expand the scope of that power beyond mere physical waste and thus bring in "economic conservation" as well. Still, even a more exhaustive meaning of the term must relate principally to intra-provincial matters, and not to matters of consequence primarily beyond the boundaries of the province (such as extra-provincial marketing—the kind of "economic conservation" that was struck down in *Central Canada Potash*).

The term "development" as it applies to constitutional issues has not received any significant judicial interpretation in the resource field. While the import of the term is sometimes hazy, the "development" phase in resource exploitation is usually considered to be the stage after exploration has finished and before production and marketing begin.[47] In this sense, the word "development" refers to the placement of physical facilities for the exploitation of the resource once it has been found to exist in sufficient quantities to warrant exploitation. The provinces have not encountered major difficulties in controlling the placement of such facilities in the past, since this could be accomplished for Crown-owned resources through the timing of issuance of Crown leases or permits, and in the case of freehold resources by legislative measures under section 92(10), pertaining to "Local Works and Undertakings" within the province. Nor have the provinces encountered any legal difficulties in *encouraging* such development when they have chosen to do so. Accordingly, the "development" power in clause 92A(1)(b) is probably a confirmation rather than an extension of provincial powers.

The word "management" can be read very broadly. The same term is used in section 92(5), in connection with the "management" of Crown-owned resources, and that head of power has certainly received a generous interpretation in the older cases that support a wide scope for provincial proprietary rights.[48] Because of the similar contexts, it is reasonable to expect that the courts will read "management" in clause 92A(1)(b) with equal breadth. It could, in fact, be read so broadly as to include almost any activity relating to the exploitation of resources within the province. Whether or not to permit a

resource to be exploited, the pace at which to allow such exploitation, where it should take place, and who should be permitted to exploit the resource—all appear to be aspects of the "management" of that resource. On this basis, the legislative powers of the producing provinces concerning their resources generally now seem to approximate the powers they have claimed all along over their Crown-owned resources.

Clause 92A(1)(b) specifically confers authority on the provincial legislature to make laws "in relation to the rate of primary production" from non-renewable natural resources and forestry resources within the province. On the face of it, this phrase appears to give a provincial legislature unlimited powers to control the rate at which a resource is to be produced within the province. This could include, for example, legislated restrictions on the maximum rate of production, or even legislated minimum rates of production, if the legislature considered that to be desirable. In the past, of course, the provinces have been able to control production rates to a certain extent. Under section 92, they have been able to do so as part of an otherwise valid conservation scheme. As far as Crown-owned resources are concerned, effective control over production rates can be exercised through appropriate terms and conditions inserted in Crown leases or permits. For the first time now, however, provincial legislatures have an express and specific power to regulate production rates without having to rely for that authority upon some other source of jurisdiction.

However, the power to regulate the rate of primary production is not a fully independent head of power. It is phrased as a part of the general laws that provincial legislatures can make in relation to the "development, conservation and management" of certain resources "in the province." As was noted above, all the powers conferred by subsection 92A(1) are expressly limited to laws pertaining to resources *within the province*. Logically, and as a matter of statutory interpretation, this limitation must also apply to any laws touching on the rate of primary production from those resources. Consequently, provincial jurisdiction over the rate of primary production must still be exercised mainly in pursuit of intra-provincial purposes. Regulation of production rates for an *extra-provincial* purpose, such as to control extra-provincial marketing of resource production, is outside the scope of subsection 92A(1). If such a purpose is within section 92A at all, it is to be found in subsection 92A(2).

Electrical energy facilities are mentioned separately in clause 92A(1)(c). That provision expressly includes the same kinds of powers pertaining to their "development, conservation and management," except that it does not specifically mention any authority to regulate

the rate of production of electricity from those facilities. This omission is rather curious, but is not likely to be significant, at least in the western provinces, largely because of the prevalence of provincial government ownership of facilities for the generation of electrical energy, which in itself should enable production rates to be controlled.[49]

To sum up, subsection 92A(1) provides provincial legislatures with a comprehensive set of general regulatory powers over resources. The entrenchment of these powers clarifies the legislative jurisdiction of the producing provinces over the resources within their boundaries, a jurisdiction cast into doubt by the judgment in the *Central Canada Potash* case. Some of these powers may also augment previous provincial legislative powers, not only as a matter of general legislative jurisdiction, but also as a supplement to the powers enjoyed by provincial governments in respect of Crown-owned resources. How the courts will interpret these powers remains to be seen; but, as in the past, they will determine their application case by case. At the moment, the only significant limitation on these powers appears to be their restriction to subject-matters that have their principal purpose and effect within the province. The validity of provincial legislative measures over matters or purposes that extend substantially beyond the province's boundaries must be judged under subsection 92A(2).

Unlike the other subsections of section 92A, subsection 92A(1) states that its enumerated powers are conferred "exclusively" on the provincial legislatures. Because of this, it could be suggested that subsection 92A(1) restricts federal legislative powers to the extent that it may have amplified provincial legislative powers. But this is not really the case. For one thing, nothing in subsection 92A(1)—or in the rest of section 92A, for that matter—limits the extraordinary powers of Parliament over natural resources. These considerable powers include the authority to assume legislative jurisdiction over intra-provincial subject-matters in emergencies,[50] or by invoking the federal declaratory power in section 92(10)(c), under which Parliament can unilaterally declare a local work wholly within a province to be "for the general Advantage of Canada" and thus transfer that work to exclusive federal jurisdiction.[51] Further, the more ordinary constitutional powers of Parliament (such as its jurisdiction over extra-provincial trade and commerce) do not usually allow it to legislate directly "in relation to" intra-provincial subject-matters, such as those listed in subsection 92A(1). Thus, the entrenchment of those intra-provincial powers in the Constitution "exclusively" in favour of the provinces does not seem to take from Parliament any jurisdiction that it had before section 92A. In any event, the judicially developed

doctrine of "paramountcy" (by which federal legislation prevails over provincial legislation in any event of direct conflict) grants precedence to any federal measure that is at odds with a provincial measure enacted under subsection 92A(1), notwithstanding that both orders of government may be exercising "exclusive" legislative powers.

It is also important to note that, as was the case with the new revenue-raising powers conferred by subsection 92A(4), there is nothing in section 92A that requires the legislature of a producing province to use its powers under subsection 92A(1), or to employ them in any particular way. Political and economic considerations, not law and constitutional theory, will determine the extent to which a provincial legislature will resort to these powers in any particular set of circumstances. A government that is ideologically averse to regulating its resource industries too closely will thus be less likely to impose strict development or production controls under clause 92A(1)(b) than would a government with a different philosophical approach. Subsection 92A(1), like the rest of section 92A, invests the provinces with legal powers, but does not indicate on its own how those powers will be used.

### (b) Export from the Province

Subsection 92A(2) is a clear addition to provincial legislative authority over resources:

> In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Before the introduction of section 92A, a province had no power to legislate directly "in relation to" the export of resource production beyond its boundaries, irrespective of the destination of that production. Provincial legislation could have an incidental effect on the export of production, but only so long as the main purpose of that legislation was a subject-matter, such as conservation, within the province and thus within provincial legislative authority.[52]

The older cases on provincial Crown proprietary rights also gave provincial governments certain powers to control the removal of Crown resource production from the province—for instance, by allowing a province to stipulate that a company had to process its

resource production locally as a precondition to granting it the right to produce the Crown-owned resource.[53] While the powers flowing from provincial Crown proprietary rights were useful in provinces where relatively high proportions of resources were owned by the Crown,[54] they did not allow such stipulations to be applied to resources owned in freehold or (more importantly) to a particular resource generally within the province, without regard to its pattern of ownership. When a province purported to regulate the export and extra-provincial marketing of resource production by legislation, without some foundation in its proprietary rights, section 92 offered no support for that legislation.[55]

Subsection 92A(2) thus clearly extends provincial legislative authority by empowering the provinces to legislate in relation to the export of resource production to other parts of Canada. However, subsection 92A(2) only gives the producing provinces concurrent legislative jurisidiction with Parliament because, unlike subsection 92A(1), the powers set out in 92A(2) are not given "exclusively" to the provinces.

To make it clear that Parliament retains all its previous jurisdiction, and that federal legislation will still take precedence over any provincial measures enacted under subsection 92A(2), subsection 92A(3) states as follows:

> Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Subsection 92A(3) does not add to federal legislative powers; indeed, nothing in section 92A can be said to have this effect. But when subsection 92A(3) is combined with the non-discrimination proviso at the end of subsection 92A(2), it makes clear the continuing federal concern for the preservation of a Canadian economic union or a "common market,"[56] by putting it beyond any doubt that Parliament retains the authority to override any "export" legislation enacted by a province under subsection 92A(2).

Thus, while subsection 92A(2) extends provincial legislative powers, it does so only to a limited extent. It gives the provinces legislative authority in relation to the removal of resource production from the province *only* when that production is destined for another part of Canada. It gives no legislative jurisdiction to the provinces in relation to the removal of resource production beyond their boundaries, when that production is also destined for export from Canada. Provincial legislative jurisdiction will thus be concurrent with federal

jurisdiction within the Canadian "common market" (though subject to overriding federal legislation), but that jurisdiction does not extend to exports of production beyond Canada's economic unit.

This limitation has some interesting interpretative implications for the provinces. For instance, at present most oil produced in the West is used or consumed in Canada; to that extent, the western oil-producing provinces—essentially Alberta and Saskatchewan—now have jurisdiction under subsection 92A(2) to legislate regarding the export of their oil to other parts of Canada. However, some resources produced in the western provinces—such as Saskatchewan potash—are almost all destined for export outside the country. Under subsection 92A(2), therefore, Saskatchewan would still have no jurisdiction to legislate directly in relation to the export of potash from the province (just as it could not, before section 92A, by virtue of the decision in *Central Canada Potash*).

Then there are resources like natural gas; significant proportions of western natural gas are both used elsewhere in Canada and also exported to the United States. For many years, both Alberta and British Columbia have required that a provincial removal permit must be obtained before natural gas can be exported from the province.[57] The federal government, through the National Energy Board, has bolstered this requirement by making the obtaining of a removal permit a precondition to granting federal gas export licences.[58] Moreover, the older cases on provincial proprietary rights give some support to the provincial removal permit requirements in respect of Crown-owned resources.[59] But serious doubts have been raised about the constitutional validity of such a requirement as a *general* regulatory measure applicable to gas production from both Crown-owned and freehold lands.[60] The reason for these doubts, of course, is that a general requirement of this kind appears to intrude upon exclusive federal jurisdiction over extra-provincial trade and commerce.

Additional authority for these removal permit requirements can now be found in subsection 92A(2), but only to the extent that provincial legislation is confined in scope to production exported "to another part of Canada." This raises an interesting question in relation to resources, like natural gas, which are destined for markets both inside and outside Canada: to what extent will the courts define the scope of provincial legislation under subsection 92A(2) by reference to the relative proportions of exported resource production that are sent, respectively, to other parts of Canada and to customers outside the country? In the past, the respective proportions of resource production used inside and outside the province of production have played an important role in the judicial determination of whether

provincial legislation really pertained to a subject-matter "within the province" under section 92.[61] Similar reasoning may determine the scope of subsection 92A(2), in circumstances where the two destinations for the resource production from a particular province do not clearly indicate one way or the other that provincial legislation is "in relation to" export "to another part of Canada" or to export "from Canada."

Curiously, in time, the validity of provincial legislation under subsection 92A(2) may also shift in respect of such "mixed destination" resources. Legislation that may be valid now, because all or substantially all the production in question is used or consumed elsewhere in Canada, could be invalidated in the future if significant international markets are found for that production. Conversely, provincial legislative authority now unavailable under subsection 92A(2), because production of the particular resource is almost entirely exported from Canada, may later come into being if substantial Canadian domestic markets are developed.

Another point of potential uncertainty in subsection 92A(2) is the case of an "indirect" export of resource production. For example, the recent proposal by Dome Petroleum for a liquified natural gas (LNG) plant in British Columbia could lead to the export of a significant quantity of Alberta natural gas.[62] All Dome's LNG production would be exported to the Far East. In that event, could Alberta enact legislation governing the export of Alberta natural gas to the Dome plant in British Columbia (for example, by restricting the volumes of Alberta gas that could be exported to that plant), on the premise that the immediate destination of the Alberta gas is "another part of Canada"? Or would such a restriction be beyond Alberta's legislative authority under subsection 92A(2), because the ultimate point of consumption of that gas would be outside Canada? In other words, would the export of Alberta gas be seen by a court to end at the Dome LNG plant in British Columbia, because it is processed there and it is only the *product* of that processing that will be exported from Canada? Or is the export of Alberta gas a continuous chain that does not end until it has reached the Far East?

The limited export jurisdiction conferred on the provinces by subsection 92A(2) is further confined by the non-discrimination proviso with which it ends. Provincial legislation in relation to export, even if restricted in scope to exports "to another part of Canada," still "may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada." It is not entirely clear what types of discrimination this proviso prohibits. Three readings are possible.

The most generous interpretation for the provinces would permit *both* price and supply discrimination between the province of production and the rest of Canada. That reading would limit the scope of the proviso to discrimination, either in prices or in supplies, among various destinations within Canada but outside the province of production. Read in this way, Alberta could set one price for oil or gas produced in Alberta that is used locally, and a different (presumably, higher) price for its oil or gas production that will be consumed in other parts of Canada. Alberta could not, however, set different prices, depending upon the identity of the other provinces to which its oil or gas was being sent (for instance, one price for Saskatchewan and Manitoba, and a higher price for Ontario and Quebec).

The second reading, and the most restrictive one for the provinces, would prohibit *any* price or supply discrimination between the province of production and the rest of Canada. Viewed in this way, Alberta could not set different prices for oil or gas produced in Alberta, even for that portion used or consumed within the province. Nor would Alberta be able to favour itself in supplies—for instance by requiring full satisfaction of local requirements before permitting exports to other parts of Canada.

It may even be that the proviso was meant to prohibit one kind of discrimination in "prices" and a different kind of discrimination in "supplies exported to another part of Canada." This reading assumes that the phrase "exported to another part of Canada" modifies only the term "supplies" and not the term "prices."[63] In this reading, price discrimination would be forbidden even between the province of production and the rest of Canada (as in the second of the two readings above). However, supply discrimination would only be prohibited between different destinations in other parts of Canada (as in the first reading). Interpreted in this way, Alberta would not be allowed to set different prices for oil or gas used within the province, as opposed to oil or gas exported to other parts of Canada. But it could discriminate in supplies between itself and the rest of Canada (for instance, by requiring that local demand be satisfied before any production could be exported), although it still could not discriminate in supplies among the other provinces.

The production from facilities in the province that generate electrical energy is also specifically included within the scope of subsection 92A(2). Provincial legislative authority over the export of electrical energy has therefore been increased to the same extent, although subject to the same qualifications, as has provincial legislative authority over the export from the province of the primary production from non-renewable natural resources and forestry resources.[64]

As was noted above, in connection with both subsections 92A(4) and 92A(1), it is important to keep in mind that section 92A speaks only to the *limits* of provincial legislative powers. It does not, in itself, indicate how provincial legislatures will use those powers. A province that wishes to regulate the export of resource production to other parts of Canada will now have enhanced powers to do so under subsection 92A(2). But a province that, for whatever reason, does not wish to interfere in the interprovincial flow of resource production is unlikely to resort to the new "export" jurisdiction in subsection 92A(2). Again, non-legal considerations will determine the extent to which subsection 92A(2) is used by the producing provinces.

## *Conclusion*

Not everything in section 92A is new, by any means. But its provisions do represent a confirmation and enhancement of the legislative powers of the producing provinces in relation to natural resources. The principal conclusions of this paper in this regard can be summarized as follows:

(i) Section 92A entrenches in the Constitution, for the first time, an extensive list of general legislative powers that are available to the legislatures of the producing provinces specifically in relation to natural resources.

(ii) Section 92A applies to non-renewable natural resources, forestry resources and facilities that generate and produce electrical energy within a province. It also applies to the production or "primary production" from those resources and facilities. The Sixth Schedule defines the "primary production" from non-renewable natural resources and forestry resources in such a way that the term includes more than what ordinarily might be thought of as "primary" production. However, section 92A does not extend to natural resources outside a province (such as those in offshore areas) or to such renewable resources as water, wildlife and agricultural land.

(iii) Section 92A addresses three issues relating to the scope of provincial legislative powers. Subsection 92A(4) deals with provincial taxation powers in respect of resources and resource production. Subsection 92A(1) deals with provincial regulatory powers over resources and resource production within the province. Subsection 92A(2) deals with provincial legislative powers in relation to the export of resource production from the province.

(iv) The legislative powers conferred on the producing provinces by section 92A do not depend for their validity upon provincial Crown ownership of resources. However, section 92A does not diminish the powers that a provincial government may exercise in its capacity as the proprietor of Crown-owned resources. Generally, the principal effect of section 92A is to bring provincial legislative powers over resources more closely in line with the powers that flow from provincial Crown proprietary rights.

(v) Subsection 92A(4) will now allow provincial legislatures to impose indirect resource taxation, both on resources *in situ* and on the production from those resources. Taxes of this kind can be applied to resource production whether or not it is exported from the taxing province. Nevertheless, section 92A does not authorize provincial taxation that differentiates between production used within the taxing province and production exported from the taxing province.

(vi) Subsection 92A(1) confirms provincial legislative powers to control and regulate the exploration for, and the development, conservation and management of resources within the province. The power to regulate the rate of primary production from non-renewable natural resources and forestry resources is specifically conferred by clause 92A(1)(b). These powers clarify the jurisdiction of the producing provinces over the resources within their boundaries. In some ways, these powers may also represent an enhancement over the former legislative powers of the producing provinces. However, the powers conferred by subsection 92A(1) can be exercised only in pursuit of purposes that are properly within provincial jurisdiction. They cannot be exercised for purposes that are outside provincial jurisdiction, such as the regulation of extra-provincial marketing of resource production. For intra-provincial purposes, however, the set of powers conferred by subsection 92A(1) seems broad enough to encompass practically any kind of provincial resource-regulation scheme.

(vii) Subsection 92A(2) expands provincial legislative powers into a new field: the regulation of the export of resource production from the producing province to other parts of Canada. This new power is subject to overriding federal legislation under subsection 92A(3), and to a requirement that any provincial export legislation cannot discriminate in prices or in supplies exported to another part of Canada. This new power does not pertain to the export of resource production from Canada.

(viii) Section 92A does not appear to diminish federal legislative powers. By subsection 92A(3), those powers are expressly preserved in relation to the new provincial "export" jurisdiction under subsection 92A(2). They are preserved by implication with respect to the new provincial taxation jurisdiction under subsection 92A(4), because these taxation powers are not said to be "exclusive" to the provinces. And they are preserved by implication with respect to the regulatory powers conferred on the provinces by subsection 92A(1), even though the provincial powers are there said to be "exclusive"; this is because nothing in that provision restricts either the extraordinary powers of Parliament to legislate for intra-provincial purposes or the ordinary powers of Parliament to legislate for extra-provincial purposes. In any event, the judicially developed doctrine of paramountcy will continue to accord precedence to any federal legislative measure in the event of a direct conflict with any provincial measure enacted under subsection 92A(1).

(ix) The fact that the producing provinces may have new legislative powers under section 92A does not necessarily mean that those powers will be used, or that they will be used in any particular way. Especially in the case of the regulatory powers conferred by subsections 92A(1) and (2), the political and economic philosophies of the particular provincial government will determine the extent to which, if at all, those powers will be used in any given set of circumstances.

As was noted at the outset, eventually the courts will be called upon to define the legal substance of the new provincial powers in section 92A. The scope of these powers is untested as yet and, as in other matters of constitutional jurisprudence, it is the courts that will have to delineate their scope on the basis of specific cases that are presented to them for decision, and in the light of the provisions of particular provincial legislation. The courts will have a great deal of flexibility within section 92A to interpret its provisions in particular cases, since its language is open to different interpretations. Accordingly, it may be some time before the full legal impact of section 92A is clear.

As in other constitutional questions, successive courts may find it necessary to review and revise the scope and substance of the powers conferred by section 92A in response to changing economic and political circumstances. It has long been said by the courts that the Constitution is a "living tree" that is "capable of growth and expansion within its natural limits."[65] Section 92A is a new branch of that tree, and it too will grow over the years through the process of judicial interpretation that has shaped and refined Canada's

Constitution. The Constitution is a dynamic instrument, and the resource amendment is no less so than any other part of it.

## *Notes*

1. *Constitution Act, 1982*, Part VI, sections 50 and 51; as enacted by the *Canada Act 1982* (UK), c.11.
2. *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449.
3. *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609.
4. P. Hogg, *Canada Act 1982 Annotated* (Toronto: The Carswell Company Limited, 1982) p. 102.
5. *Constitution Act, 1982*, section 52.
6. *Constitution Act, 1982*, Part V.
7. When compared, for instance, to some of the provisions of sections 91 and 92 of the Constitution, which set out the general division of legislative powers between the federal and provincial orders of government.
8. See, for instance, the comments of the Alberta Court of Appeal in *Reference Re Proposed Federal Tax on Exported Natural Gas* (1981), 122 D.L.R. (3d) 48, [1981] 3 W.W.R. 408.
9. *Reference Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, 65 D.L.R. (2d) 353.
10. *Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* [1984], 5 D.L.R. (4th) 385.
11. *A.G. British Columbia v. Esquimalt and Nanaimo R.R.*, [1950] A.C. 87, [1950] 1 D.L.R. 305 (Privy Council); *C.P.R. v. A.G. Saskatchewan*, [1952] 2 S.C.R. 231, [1952] 4 D.L.R. 11 (Supreme Court of Canada).
12. *Nickel Rim Mines Ltd. v. A.G. of Ontario*, [1966] 1 O.R. 345, 53 D.L.R. (2d) 290 (Ontario Court of Appeal), affirmed [1967] S.C.R. 270, 60 D.L.R. (2d) 576 (Supreme Court of Canada); *Re Newfoundland & Labrador Corporation Ltd. and A.G. Newfoundland*, [1982], 138 D.L.R. (3d) 577 (Supreme Court of Canada).
13. *A.G. British Columbia v. McDonald Murphy Lumber Co.*, [1930] A.C. 357, [1930] 2 D.L.R. 721 (Privy Council); *Texada Mines Ltd. v. A.G. British Columbia*, [1960] S.C.R. 713, 24 D.L.R. (2d) 81 (Supreme Court of Canada); *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, *supra* note 2; *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*, *supra* note 3.
14. *Oil Export Tax Act*, S.C. 1973-74, c.53.

15. *An Act to amend the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas*, S.C. 1980-81-82-83, c.68.

16. S.C. 1970-71-72, c.63.

17. Combined, in the cases of Manitoba, Saskatchewan and Alberta, with the 1930 Resource Transfer Agreements and, in the case of British Columbia, with the 1930 Railway Belt and Peace River Block Re-Transfer Agreement: see *Constitution Act, 1930* (U.K), 21 Geo. V, c.26. Section 109 itself reads as follows:
"All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

18. See, for example, *A.G. Alberta v. Huggard Assets Ltd.*, [1953] A.C. 420, [1953] 3 D.L.R. 225 (Privy Council), in which the unilateral variation of royalty rates by a provincial government was upheld under a "variable royalty" clause in a Crown lease.

19. J. Ballem, "Constitutional Validity of Provincial Oil and Gas Legislation" (1963), 41 *C.B.R.* 199, at 203.

20. D. Lewis and A. Thompson, *Canadian Oil and Gas* (Toronto: Butterworths, 1971), 30.

21. *Supra*, note 2. For a discussion of the decision in *CIGOL*, see W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980), 18 *Osgoode Hall L.J.* 1, at 11-27.

22. D. Thring, "Alberta, Oil, and the Constitution" (1979), 17 *Alberta L. R.* 69, at 86-89; W.D. Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution" (1983), 21 *Alberta L. R.* 472, at 484.

23. See cases cited in notes 11 and 12.

24. *A.G. British Columbia v. C. P. R.*, [1927] A.C. 934, 1927 4 D.L.R. 113 (Privy Council); *The King v. Caledonian Collieries Ltd.*, [1928] A.C. 358, [1928] 3 D.L.R. 657 (Privy Council).

25. *A.G. British Columbia v. Esquimalt and Nanaimo R.R.*, *supra* note 11.

26. *A.G. British Columbia v. McDonald Murphy Lumber Co.* and *Texada Mines Ltd. v. A.G. British Columbia*, *supra* note 13.

27. See P. Hogg, *Canada Act 1982 Annotated*, *supra* note 4, at 103.

28. Relatively little use may be made of this new power because of the prevalence of provincial public ownership of electrical generating facilities in the West. See *The Manitoba Hydro Act*, C.C.S.M. c.H-190; *The Power Corporation Act*, R.S.S. 1978, c.P-19; *Hydro and Power Authority Act*, R.S.B.C. 1979, c. 188. Alberta is the only exception among the western provinces.

29. *The Oil Well Income Tax Act*, R.S.S. 1978, c. 0-3.1 (Supp.); *The Freehold Oil and Gas Production Tax Act*, S.S. 1982-83, c. F-22.1.

30. *The Mineral Taxation Act*, R.S.S. 1978, c. M-17; *The Mineral Taxation Act, 1983*, S.S. 1983-84, c. M-17.1.

31. It has been rumoured for some time that Alberta is planning to adopt a freehold oil and gas production tax system, much like that already in effect in Saskatchewan, in place of the land-based taxes presently imposed under *The Freehold Mineral Taxation Act*, R.S.A. 1980, c. F-19. No such legislation has yet appeared.

32. See, for instance, *The Oil and Natural Gas Tax Act* C.C.S.M. co. 0-35; *The Mineral Taxation Act*, R.S.S. 1978, c. M-17; *The Freehold Mineral Taxation Act*, R.S.A. 1980, c. F-19; *The Mineral Land Tax Act*, R.S.B.C. 1979, c. 260.

33. See cases cited in note 11.

34. *The Oil and Natural Gas Tax Act*, C.C.S.M. c. 0-35 (Schedule B).

35. *The Mineral Land Tax Assessment Regulations, 1982*, B.C. Reg. 495/81.

36. See note 17 for the text of section 109.

37. *Smylie v. The Queen* (1900), 27 O.A.R. 172 (Ontario Court of Appeal); *Brooks-Bidlake & Whittall Ltd. v. A.G. British Columbia*, [1923] A.C. 450, [1923] 2 D.L.R. 189 (Privy Council). See also G. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), chapter 9.

38. See, for instance, J. Ballem, "Oil and Gas and the Canadian Constitution on Land and under the Sea" (1978), *Law Society of Upper Canada Special Lectures* 251; M. Crommelin, "Jurisdiction over Onshore Oil and Gas in Canada" (1975-76), 10 *U.B.C.L.R.* 86; Ballem, "Constitutional Validity of Provincial Oil and Gas Legislation", *supra* note 19; Thring, "Alberta, Oil and the Constitution", *supra* note 22.

39. S. Bushnell, "Constitutional Law—Proprietary Rights and the Control of Natural Resources" (1980), 58 *C.B.R.* 157; Moull, "Natural Resources: Provincial Property Rights", *supra* note 22.

40. See, for instance, M. Leitch, "The Constituional Position of Natural Resources," in Peter Meekison (ed.), *Canadian Federalism: Myth or Reality*, third edition (Toronto: Methuen Publications, 1977), 170.

41. See notes 19 and 20.

42. S.A. 1980, c. 32; Alta. Reg. 325/80.

43. *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, [1933] 4 D.L.R. 545 (Supreme Court of Canada).

44. The Saskatchewan potash pro-rationing scheme also attempted to fix the minimum prices that potash producers could charge. This aspect of the case certainly helped the Supreme Court of Canada to reach its conclusion. But even if Saskatchewan had not attempted to fix prices, it is likely that the Court would have come to the same conclusion, because

the attempt to restrict production rates was clearly aimed at reducing the supply of potash available in the international market. For a discussion of the decision in *Central Canada Potash*, see Moull, "Natural Resources: The Other Crisis", *supra* note 21, at 27-39.

45. See *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, *supra* note 43.

46. For a discussion of the distinction between economic and physical waste, see M. Sychuk, "Conservation: Is It Justified in the Public Interest?" (1969), 7 *Alberta L.R.* 355.

47. *Johnson's Asbestos Corp. v. Minister of National Revenue* (1965), 65 D.T.C. 5089 (Exchequer Court of Canada).

48. *Smylie v. The Queen* and *Brooks-Bidlake & Whittall Ltd. v. A.G. British Columbia*, *supra* note 37.

49. See note 28.

50. *Anti-Inflation Reference*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 (Supreme Court of Canada).

51. See J. Ballem, "The Energy Crunch and Constitutional Reform" (1979), 57 *C.B.R.* 740. Such a declaration has been in force for uranium mines since the mid-1940s: see *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, s. 17. Because of this declaration, it is unlikely that section 92A has extended provincial regulatory powers over uranium mines.

52. *Spooner Oils Ltd. v. Turney Valley Gas Conservation Board*, *supra* note 43; *A.G. Saskatchewan v. A.G. Canada*, [1949] A.C. 110, [1949] 2 D.L.R. 145 (Privy Council).

53. *Smylie v. The Queen*, *supra* note 37.

54. See notes 19 and 20.

55. *Central Canada Potash Co. v. Government of Saskatchewan*, *supra* note 3.

56. See, for instance, Hon. Jean Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Minister of Supply and Services Canada, 1980). This philosophy is also reflected in section 121 of the Constitution, which requires that: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

57. *The Gas Resources Preservation Act*, R.S.A. 1980, c.G-3; *Utilities Commission Act*, S.B.C. 1980, c.60.

58. *National Energy Board Part VI Regulations*, C.R.C. 1978, c. 1056.

59. *Smylie v. The Queen*, *supra* note 37.

60. Ballem, "Constitutional Validity of Provincial Oil and Gas Legislation", *supra* note 19, at 219; Crommelin, "Jurisdiction over Onshore Oil and Gas in Canada", *supra* note 38, at 119-20.

61. *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, *supra* note 2; *Central Canada Potash Co. v. Government of Saskatchewan*, *supra* note 3; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, *supra* note 43.

62. National Energy Board, *Reasons for Decisions—Gas Export Omnibus Hearing, 1982* (Ottawa: Minister of Supply and Services Canada, 1983).

63. This reading implies the addition of a comma into the non-discrimination proviso, so that it would prohibit "discrimination in prices, or in supplies exported to another part of Canada." Such a reading is supported by the French version of subsection 92A(2), which also lacks the crucial comma but yet more clearly divides the two kinds of discrimination mentioned. The English and French versions of section 92A are equally authoritative: *Constitution Act, 1982*, section 57.

64. Again, however, extensive provincial public ownership of these facilities in the western provinces may mean that relatively little use will be made of the new power in this regard; see notes 28 and 49.

65. *Edwards v. A.G. Canada*, [1930] A.C. 124, [1930] 1 D.L.R. 98 (Privy Council).

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